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Military Courts in a Democratic South Africa: In search of their Judicial Independence

By

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ABSTRACT

Thesis Title:

Military Courts in a Democratic South Africa: In search of their Judicial Independence

Submitted by:

Aifheli Enos Tshivhase on 16 August 2012

The new constitutional era in South Africa has brought fresh demands on all institutions of society. The South African military justice system has not been spared. The pressure to transform this system has also been fuelled by a wave of reform of military justice systems in other democratic Commonwealth jurisdictions. In this thesis, I evaluate South African military courts against the basic requirements of judicial independence as interpreted by the Constitutional Court and relevant international bodies. In doing so, I draw on my experience of working in military courts as defence and prosecution counsel respectively in the South African National Defence Force.

I conclude that all forums of military justice (including the Commanding Officer's Disciplinary Hearing) do not meet most requirements for judicial independence. Military judges lack security of tenure; financial security; institutional independence on important administrative aspects; and their institutional impartiality is questionable.

I further investigate a suitable model of judicial independence for South African military courts in the democratic era. I propose a new model guided by the following: relevant principles of constitutional and international law relating to judicial independence and the right to a fair trial; emerging foreign trends; and most importantly, military uniqueness and operational effectiveness. In analysing relevant foreign trends, I conclude that there is a strong movement towards strengthening the judicial independence of military courts and make comprehensive suggestions to ensure a stronger degree of judicial independence of South African military courts.

I also conclude that military courts at lower levels compare very closely with magistrates' courts, and propose that the reform of military courts must take that fact into account. I support the idea of creating an independent structure to deal with affairs of the military judiciary. Further, I propose that South African military judges should be granted tenure until the age of retirement.

Finally, I argue against 'civilianisation' of military courts and suggest that the independence of these courts should be improved by integrating principles of judicial independence into the military set up.

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The process of writing this thesis would have been more difficult if I did not have a supervisor of Prof Hugh Corder's calibre. I am forever hugely indebted to him for his incisive guidance and amazing attention to detail. Furthermore, his appreciation of other pressures of life which I have had to negotiate at various stages made it easier for me to withstand the challenges of writing a PhD thesis. Hugh was persistent but very encouraging. I have been amazed by his human touch.

The possibility of writing a thesis in this field became apparent during a conference of the Armed Forces Law Association of New Zealand (2005), Wellington Barracks, when it became clear to me that different models of ensuring the judicial independence of military courts in the modern era were emerging. Since committing myself to reading for a doctorate in this field in 2008, I have been privileged to travel to many places, testing some of the ideas in this thesis. It has been an uplifting journey and sometimes full of contradictions, given what is happening in different parts of the world on this subject.

My first port of call was the University of Melbourne in Australia where I spent a month under the auspices of the Asia Pacific Centre for Military Law in 2008. I thank Prof Cheryl Saunders of the Melbourne Law School for facilitating my visit to Melbourne, where, I was privileged to share my initial ideas with Bruce 'Ossie' Oswald of the Asia Pacific Centre for Military Law (and also of the Australian Defence Force (ADF)). Through Ossie's generous efforts, I was able to meet the Chief Military Judge of the newly established Australian Military Court (now defunct), Brigadier Ian Westwood (as he then was) and to attend a hearing of that Court at the Victoria Barracks. Brig Westwood shared with me insights about developments in Australia and showed great interest in my work. The time I spent in that country (mainly in Melbourne) shaped my thoughts significantly during the early stages of my thesis, and also encouraged me to pursue the subject with vigour.

The following year (June/July 2009), I attended the ATLAS AGORA Doctoral Programme at the London School of Economics (LSE) which provided me with an opportunity to present my concrete proposal. I thank the people at the LSE, in

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My final foreign destination was Yale University where I spent an academic year as a Fox International Fellow (2009-2010) working closely with Eugene Fidell of the Yale Law School and President of the National Institute of Military Justice (as he then was). I am indebted to him for making my stay at Yale productive, and I particularly thank him for his comments on Chapter Seven of the thesis. Thanks also go to other Fox Fellows at Yale and staff associated with the Fellowship for their critique during the two seminars where I presented my thesis in its advanced form.

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Having said all this, any flaws in this thesis are entirely my responsibility.

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Finally, I thank my wife, Olivia, and our two daughters, Ifa and Ipfi, for patiently affording me space to embark on this challenging journey during times I should have been spending with them.

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ABBREVIATIONS

ADF	Australian Defence Force
AG	Adjutant General
CMA	Court of Military Appeals
CCMA	Commission for Conciliation, Mediation and Arbitration
CMJ	Court of Military Judge
CODH	Commanding Officer's Disciplinary Hearing
CSMJ	Court of Senior Military Judge
ECHR	European Convention on Human Rights
HRC	Human Rights Committee (UN)
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
MBC	Military Bargaining Council
MDC	Military Discipline Code
MPA	Military Prosecution Authority
LRA	Labour Relations Act
NDPP	National Director of Public Prosecutions
OSD MLP	Occupation Specific Dispensation for Military Law Practitioners
PAJA	Promotion of Administrative Justice Act
SANDF	South African National Defence Force
UCMJ	Uniform Code of Military Justice
UDHR	Universal Declaration of Human Rights
UMDC	Union Military Discipline Code
UN	United Nations

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CHAPTER 1

INTRODUCTION

1.1 Background to the study

Developments in human rights in the late 20th century have facilitated increased scrutiny of military courts.¹ These courts have recently been the subject of debate and litigation in a number of countries resulting in a wave of reviews of military court systems.² For example, in New Zealand,³ significant reforms of the respective systems have been completed recently.⁴ The system was reformed to bring it in line with human rights norms and current international trends. In Australia, shortly after the adoption of the new military justice system establishing the Military Court of Australia, the system was declared to be unconstitutional by the Australian High Court in *Lane v Morrison*.⁵ As a result, further and radical reforms are awaited in that country.⁶ Notably, and following the European Court of Human Rights decisions in *Findlay v The United Kingdom (Findlay)*⁷ and, more recently, *Cooper v The United Kingdom*,⁸ the United Kingdom has been

¹ Aifheli Enos Tshivhase 'Military Courts in a democratic South Africa: An assessment of their independence' (2006) 6 *New Zealand Armed Forces Law Review* 96, 96.

² Military court system and military justice system will be used interchangeably in thesis.

³ For a detailed account of the review process in New Zealand see Chris Griggs 'A New Military Justice System in New Zealand' (2006) 6 *New Zealand Armed Forces Law Review* 62.

⁴ See Armed Forces Discipline Amendment Act (No 2) 2007 with respect to some of the reforms in New Zealand.

⁵ (2009) 239 CLR 230.

⁶ See Military Court of Australia Bill 2012 tabled before the House of Representatives in June 2012

http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4853 [accessed on 17 July 2012].

⁷ [1997] ECHR 8.

⁸ [2003] ECHR 686.

persuaded to review its system on more than one occasion.⁹ In *Findlay*, the Court found the British military court system to be in violation of the right to be heard by an independent and impartial tribunal as provided for in Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, popularly known as the European Convention on Human Rights (ECHR) and hereinafter referred to as such. This led to some review of the system. In *Cooper*, although the Court found the system to be generally in compliance with essential requirements of judicial independence, it expressed its concern about a criminal procedure which empowered a non-judicial authority to interfere with judicial findings of a court-martial in the process of reviewing decisions of such courts. For the first time in over fifty years the legislation which underpins service law in the United Kingdom has been completely re-written following these two cases.¹⁰

Similarly, the Turkish military court system has, on more than one occasion, also been challenged successfully in the European Court of Human Rights. In *Mehmet Ali Yilmaz v Turkey* the Court found the Turkish system of military courts to be lacking in independence on several counts.¹¹

In Uganda, the status and jurisdiction of military courts has been challenged on several occasions, notably in *Uganda Law Society*

⁹ See generally G.R. Rubin 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' (2002) 62 *Modern Law Review* 36 for a discussion of factors influencing changes in British military law.

¹⁰ See the Armed Forces Act 2006
http://www.opsi.gov.uk/acts/acts2006/ukpga_20060052_en.pdf [accessed on 20 April 2006].

¹¹ (2001) ECHR 548. For a good description of the wave of reforms and their influences in various countries see a piece by the President of the International Society for Military Law and the Law of War and Judge Advocate of the Norwegian Armed Forces Arne Willy Dahl 'International Trends in Military Justice' 2011. The piece was presented at the Global Military Appellate Seminar at Yale Law School, USA http://www.law.yale.edu/2011-04_International_trends.pdf [accessed on 10 May 2012].

v Attorney General of the Republic of Uganda.¹² However, in that country, the focus of most challenges has been concerned with the use of military courts to try civilians rather than a substantive attack on the military justice system.

Canada, however, stood out as a leader in the reviews of military court systems for some time because it reviewed its system way before the jurisdictions cited although some of these have now made far reaching strides.¹³

In South Africa, military courts have been under pressure to transform since the adoption of the new Constitution in 1996 (Constitution).¹⁴ In 1999, certain aspects of the courts-martial system were constitutionally and successfully challenged in *Freedom of Expression Institute and Others v President, Court Martial and Others*.¹⁵ In this case, the High Court found certain aspects of the system to be in violation of the right to a fair trial which includes the right to be tried by an independent tribunal. This challenge resulted in the overhaul of the system in the same year which resulted in the adoption of the Military Discipline Supplementary Measures Act 16 of

¹² (2006) UGCC 10 <http://www.ulii.org/ug/judgment/constitutional-court/2006> [accessed on 16 July 2012]. This case dealt with several issues most of which are not directly relevant to this study. Some of the issues dealt with were the constitutionality of concurrent proceedings in the High Court and in the General Court-Martial based on the same facts, and the status of courts-martial within the justice system in Uganda. On the latter question, the Constitutional Court of Uganda held, by a majority decision, that the General Court-Martial was the equivalent of the High Court in the civil court system. Furthermore, the Court found it to be constitutionally permissible for civilians in certain cases to be tried by military courts provided the principles of the rules of natural justice and the rules of evidence and procedure were strictly followed. However, in the instant case, the Court held that the General Court-Martial had no jurisdiction to try the accused (civilian) because the court-martial was excluded from trying offences such as terrorism. These were only triable by the High Court. It is worth noting that the Uganda Peoples Defence Forces Act 7 of 2005 hardly shows any commitment to judicial independence and impartiality.

¹³ For a discussion of military law reforms in Canada, see D McNairn 'Military Law Reform in Canada' (2003) *New Zealand Armed Forces Law Review* 51. This country was forced to grant tenure until age of retirement for military judges in 2011 in the case of *R. v. Leblanc* 2011 CMAC 2.

¹⁴ Constitution of the Republic of South Africa, 1996.

¹⁵ 1999 (2) SA 471 (C).

1999. This was a forced and rushed overhaul of the system—initiated and finalised in less than a year.

Nevertheless, the system still faces enormous challenges at various levels. The appointment of a Ministerial Task Team by the Minister of Defence in 2004 (The Ministerial Task Team Report) to review aspects of the military justice system, and more recently the Ministerial Legal Audit Committee to spearhead and facilitate the process of review of the system, are an acknowledgement of the existence of these challenges. However, since the task team tabled its report, the process of enacting a bill to kick start the reform process has been very slow.

1.2 Outline of research problem

Constitutional and international norms require military courts to be independent.¹⁶ Section 165(2) of the Constitution guarantees the independence of all courts. It provides that '[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.' Furthermore, section 174(7) of the same Constitution provides that other judicial officers (those of lower courts) 'must be appointed in terms of an Act of Parliament which must ensure that their appointment, promotion, transfer or dismissal, or disciplinary steps against, these judicial officers take place without favour or prejudice.' This means that any legislation which is aimed at dealing with any of the above matters is subject to constitutional control including legislation establishing military courts.

¹⁶ See recent Report on *Civil and Political Rights including the Question of Independence of the Judiciary, Administration of Justice, Impunity, Issue of the Administration of Justice through Military Courts* UN Doc. E/CN.4/2006/58 (13 January 2006).

As will be demonstrated further below, the independence of South African military courts is questionable. Problems relating to judicial independence and the right to be tried by an independent and impartial tribunal can be identified.¹⁷ Individual military judges do not enjoy some essential requirements of judicial independence. They lack basic financial security, security of tenure and perceived impartiality. Furthermore, the status of military judges sitting as judicial officers in military courts makes their independence from the military command and the executive debatable. There are also problems with the procedure of appointment, renewal and also the removal of military judges. Another area of concern is that the current framework of military judicial reviews compromises the dignity and credibility of military courts.¹⁸

The uniqueness of the military environment poses a challenge in terms of determining ways of achieving an appropriate degree of independence of military courts. Moreover, what has emerged from the wave of reforms taking place in a number of jurisdictions is that there are different ways of ensuring judicial independence of military courts, and that different jurisdictions accord different degrees of independence to these courts.

Furthermore, a recent study of military justice systems in various democratic countries and representing different legal traditions also shows different ways of structuring military courts in relation to their independence in the modern era.¹⁹ These include

¹⁷ The Ministerial Task Team Report points out some of the flaws in the system (on file with the author).

¹⁸ For a discussion of these problems see Tshivhase (note 1 above). See also by the same author 'Transformation of Military Courts' (2009) *SA Public Law* 24(2) 450-485. For another perspective on the independence of the system and other related issues see also M Carnelley 'The South African Military Court System – Independent, Impartial and Constitutional?' (2006) 34(1) *Scientia Militaria: South African Journal of Military Studies* 55.

¹⁹ International Commission of Jurists *Military jurisdiction and international law: Military courts and gross violations of human rights* 2004 www.icj.org/news.php3?id_article=3254&lang=en [accessed on 20 June 2007]. The

countries representing the following legal traditions: common law; civil law; socialist; and Scandinavian countries. As will be explained further below, this thesis will consider some of the common law jurisdictions because, in structuring their military court systems, they have had to face the challenge of balancing their general legal traditions with the uniqueness of the military environment. As a common law jurisdiction, South Africa faces a similar challenge.

This study therefore investigates suitable ways of achieving an appropriate degree of judicial independence for military courts in South Africa.

The thesis seeks to demonstrate two key aspects: (a) that South African military courts do not meet some basic requirements of judicial independence; and (b) ways of achieving an appropriate degree of judicial independence of military courts. The thesis argues for a stronger degree of judicial independence of military courts. An attempt is made to do this without losing sight of the uniqueness of the military environment. The thesis is premised on the idea that achieving an appropriate degree of independence of military courts will require reform of the system which takes into account the following factors: principles of constitutional and international law relating to judicial independence and the right to a fair trial; emerging foreign trends;²⁰ and most importantly, military needs or operational effectiveness. In relation to the last factor (military needs) the focus will be on the following imperatives: maintenance of military discipline; consistency in all strategic environments; requirements of command and control; portability of the system; expedition and efficiency of the system. These factors are informed by the mandate of

study included countries such as Poland; Spain; Norway; Switzerland, the United Kingdom; the United States; a number of South American countries to name but a few. Regrettably, none of the African countries was studied.

²⁰ The criteria of countries chosen for comparative study are set out further below (para 1.7).

the defence force both in peace and war times and the constitutional requirement that the defence force must be structured and managed as a disciplined military force.²¹

1.3 Research objective

The aim of this thesis is to demonstrate that South African military courts do not comply with constitutional and international standards of judicial independence, and more importantly, to suggest a model for ensuring their independence.

1.4 Significance of the study

In the democratic South Africa, it can be expected that various aspects of military law will be questioned from time to time in the light of the demands of the new Constitution. Thus far, the military justice system has been subjected to constitutional challenges on two occasions. The first challenge concerned the independence of courts-martial in 1999 while the second concerned the separate existence of the military prosecuting authority, independent from the National Prosecuting Authority.²² The military court system is currently undergoing its second reform since the dawn of democracy.

It is important for South Africa to be pro-active in the process of reviewing the military court system and to avoid piecemeal reforms

²¹ Section 200(1) of the Constitution. These factors have been taken into account in the review of the New Zealand military court system. See Griggs (note 3 above) in this regard.

²² *Minister of Defence v Potsane & Others* 2002 (1) SA 1 CC. In this case, the separate existence of the military prosecuting authority as provided for in the Military Discipline Supplementary Measures Act was challenged on the basis that the Constitution makes provision for 'a single national prosecuting authority'. In interpreting these words, Kriegler J held that the word 'single' does not mean one and only and also explained the need to have a separate prosecuting authority for the military.

arising out of court challenges. The experiences of Canada and the United Kingdom have shown that ‘such challenges could develop very quickly and have the potential to seriously undermine the military justice system.’²³ According to Griggs, the process of review in United Kingdom following piecemeal court challenges has demanded the allocation of significant resources by the British Ministry of Defence and has also produced some outcomes which in the longer term may be difficult to reconcile with the vital elements required for a successful military justice system.²⁴

The limitation of the ongoing reform of the system is the dearth of home grown knowledge which the process of reform could draw from. In reforming the South African military court system and with the view of bringing it in line with constitutional and international norms, a wealth of knowledge and scholarship on ways of improving the system can enrich the process. It is hoped that this study will contribute such knowledge, on which the process of review of the system could draw in relation to the judicial independence of military courts.

1.5 Literature review

There is an abundance of literature on judicial independence, but most of it focuses on civilian courts. Two recent studies are worth noting. In the Southern African context, the study by the Democratic Governance and Rights Unit is of particular note.²⁵ This landmark study makes use of the most recent international understandings in evaluating judicial independence in selected jurisdictions of Southern Africa.

²³ Griggs (note 3 above) 64.

²⁴ *Ibid.*

²⁵ University of Cape Town entitled *The Judicial Institution in Southern Africa* 2006.

At the global level is the study comprising a collection of essays edited by Russell and O'Brien entitled: *Judicial Independence in the Age of Democracy, Critical Perspectives from around the world*.²⁶ Despite its focus on civilian courts, this literature has informed this thesis.

However, as already pointed out, there is very limited scholarship on the study of judicial independence with particular focus on military courts post the 1996 democratic Constitution. A study which can be noted is the Ministerial Task Team Report. The report strongly showed that the forced and rushed reform (1999) did not address some of the key challenges facing the system particularly in relation to the independence of military courts. It looked at a number of aspects which are the subject of investigation in this thesis.

However, the report is very limited in scholarship and research which can be attributed to its purpose and the fact that the Task Team had a very limited time frame. Furthermore, the Team was also burdened with a host of other issues in addition to looking at the independence of military courts.²⁷ Secondly, it did not deal with some crucial questions on judicial independence of military courts. For example, it did not address the issue of the appropriate level of remuneration of military judges. Furthermore, it makes some recommendations I consider to be inappropriate for military courts which I intend to address in this thesis. For example, one of the key recommendations of the Task Team was that some civilian elements must be introduced into the military court system.²⁸ Despite these

²⁶ 2001. See also a more recent study building on the earlier study referred to above Russell P & Malleson K (eds.) *Appointing judges in an Age of Judicial Power: Critical Perspectives from around the World* (2004).

²⁷ For example, it also looked at military disciplinary hearings, military offences and types of punishment and the issue of overlapping jurisdiction with civilian courts.

²⁸ See Tshivhase (note 1 above) 122-123 for a discussion on this point.

limitations, the report of the Task Team has shaped aspects of this thesis.

Other available writings directly relevant to the topic are Carnelley's article²⁹ and my earlier work on the subject.³⁰ These both assess the independence of the current system of military courts. Common to the two pieces of work is that they are, for obvious reasons, not exhaustive enough to be noted as significant and comprehensive pieces for purposes of this work.

There are also military law studies undertaken and reports compiled in other jurisdictions focusing on aspects relevant to this work.³¹ It is not necessary to reflect these studies here because they were written or prepared in the context of their respective jurisdictions and cannot be regarded as significant for purposes of literature review in this thesis. However, some of the foreign studies mentioned in the preceding pages of this Chapter have indeed assisted the writing of this thesis.

On the global level, the study by the International Commission of Jurists (ICJ) entitled: *Military jurisdiction and international law*:

²⁹ Note 18 above. Carnelley's main conclusion is that South African 'military courts can in general be regarded as independent and impartial although, with small changes, any doubt with regard to independence could be eradicated.' In contrast, I have concluded that there were a number of flaws with regards to military courts at lower levels (Tshivhase note 1 above).

³⁰ Tshivhase (note 1 above).

³¹ See, for example, David McNairn 'Does Canada Need a Permanent Military Court?' (2006) 18 *National Journal of Constitutional Law* 2005; Michael Doi 'The Judicial Independence of Canadian Forces General Court Martials: An Analysis of the Supreme Court of Canada Judgment in *Regina v. Genereux*' (1993) 16 *Dalhousie Law Journal* 234; Guy Gurnoyer and Tiphaine Dickson 'Of Legal Free Trade and Opportunity Lost: How Canadian Constitutional Law could have Tipped the Scale in Favour of an Independent Military Justice System in the United States' (May 1994) 41 *Federal Bar News & Journal* 270; J. Jason Samson and Mike Maden 'Entrech the Bench! Canada's Pressing Need for a Permanent Military Court' (2009) *Criminal Law Quarterly* 215. Although most of these writings have been overtaken by events to some degree, they are useful in tracking the history of reforms of the Canadian military justice system.

Military courts and gross violations of human rights is worth noting.³² This study focuses on the practice of using military courts to try members of the military who have carried out or aided and abetted the carrying out of, human rights abuses. It describes the organisation of military courts in selected countries. It notes that the organisation of military courts in various jurisdictions varies and also makes reference to some emerging trends regarding military justice influenced mainly by international jurisprudence on the subject. The study concludes that:

on the whole, as far as ensuring that justice is dispensed independently and impartially is concerned, military courts do not adhere to the general principles and international standards and their procedures are in breach of due process. In many countries, so-called 'military justice' is organizationally and operationally dependent on the executive.³³

While the study is a major resource for this work, it does not pay particular attention to South Africa as a jurisdiction.

Finally, I should say a few words about a very recent study by Nel focusing on *Sentencing practice in military courts* [South Africa]³⁴ which came to my attention shortly after finalising the writing of this thesis for submission. The study deals with the status of the Commanding Officers' Disciplinary Hearing (CODH) and the independence of military courts as incidental questions. Its primary focus is self evident from its title. Despite the time constraints faced by the author, an attempt has been made to consider the key arguments and conclusions in that study in as far as they relate to this thesis.

³² ICJ (note 19 above).

³³ *Ibid* 10.

³⁴ Michelle Nel *Sentencing Practice in Military Courts* (2012) Thesis submitted for LLD Degree, University of South Africa
http://uir.unisa.ac.za/bitstream/handle/10500/5969/dissertation_nel_m.pdf?sequence=1 [accessed on 26 July 2012]. This thesis was submitted in January 2012 and made available on the above-mentioned website on 06 July 2012.

For purposes of this thesis, Nel's study concludes that the constitutional rights of accused persons are not applicable to the CODH. It also concludes that South African military courts are sufficiently independent. However, I have not been persuaded by Nel's arguments and her subsequent conclusions for reasons set out in Chapters Three and Six of this thesis. Furthermore, while one accepts that judicial independence of military courts was not the primary concern of her thesis, I am of the respectful view that she has perceived the problem of judicial independence wrongly.

That said, the divergence of conclusions between me and Nel vindicates the need for studies of this subject.

1.6 Limits of research project

This research will not measure the independence of the CODH because this forum cannot be regarded as a court of law. The CODH differs from military courts in at least five main respects. First, it is presided over by the officer commanding or his/her representative, who need not have a law degree.³⁵ Second, it only hears guilty pleas.³⁶ Third, it does not follow strictly the rules of criminal procedure and the law of evidence. Fourth, accused before the CODH generally have no right to legal representation during the proceedings.³⁷ Fifth, the CODH cannot impose a sentence of imprisonment nor a fine in excess of R600. However, the study attempts to locate the status of the CODH within the military court system, and it also considers the applicability of several constitutional rights to the CODH.

Furthermore, the form of judicial independence considered in this thesis refers to independence from state organs. In other words,

³⁵ Section 11 of the Military Discipline Supplementary Measures Act.

³⁶ *Ibid* s 29(7).

³⁷ See *ibid* s 23(a).

the thesis does not consider independence of military courts from non-state actors.

1.7 Research methodology and countries chosen for comparative study

Data are drawn from primary and secondary sources. Relevant primary sources such as treaties, legislation (both domestic and foreign), resolutions, directives and reports of governments and intergovernmental organizations are used extensively. International, domestic and foreign case law are also used extensively. The secondary sources include books, journal articles, and information from the internet. Where appropriate, I also draw on my own personal military experience and observations arising from my service as a Military Defence Counsel in the regular force of the South African National Defence Force for two years and later as a Military Prosecution Counsel for four years (reserve force).

Although the thesis is not styled as a comparative study, there are several jurisdictions which have significantly shaped key parts of the work. Almost all of the countries considered are common law and democratic jurisdictions which have recently reviewed their military justice systems, and most importantly, have shown some commitment to the principle of judicial independence in structuring military courts. These are countries considered to be on the cutting edge of reform of military justice systems the world over. They are as follows: New Zealand, United Kingdom, Canada, United States,³⁸ Australia, and to some extent, India because it only recently entered the scene of military courts reforms but in a limited fashion. Countries on the African continent do not feature in this study mainly because military

³⁸ The United States military justice system is the most famous in the world probably because of its publicity, and that country has held debates about its system many times and in different forums including courts.

laws of countries that could have been considered hardly show any signs of respect for the principle of judicial independence, and therefore, with respect, do not offer any positive lessons for South Africa, given the progress already made by this country. Examples are Zimbabwe,³⁹ Tanzania,⁴⁰ Ghana,⁴¹ and Uganda.⁴² For the most part, these countries are still trapped in the old British court-martial system. Ironically, the United Kingdom has moved away from that system, albeit involuntarily as previously noted.

There may very well be other interesting jurisdictions to consider, but for pragmatic reasons, it is not possible to analyse each country in a study of this nature, and some choices have to be made.

1.8 Structure of the thesis

The thesis is divided into four parts namely contextual and organizational issues styled as the introduction; introduction to military courts and their status and uniqueness; analysis of the theoretical framework, its application to military courts and assessment of judicial independence of South African military courts; and a proposed model of judicial independence for South African military courts and conclusion. A description of these parts follows but with the exclusion of Part 1 as this chapter already constitutes this part.

³⁹ See Defence Act: Chapter 11:02, 1972.

⁴⁰ See for example Military Court Act 15 of 1964.

⁴¹ See Armed Forces Act 105 of 1962

⁴² The Uganda Peoples Defence Forces Act 7 of 2005. Although this Act was adopted in the modern era, there are no signs (in the Act) of any serious commitment (on the part of Uganda) to the principle of judicial independence in relation to military courts. This Act says nothing about the independence and impartiality of military courts in that country.

1.8.1 Part 2: Introduction to military courts and their status and uniqueness

This part of the study has two chapters. Chapter Two has three parts. The first part is aimed at providing a brief history of military courts in South Africa and introducing the current military court system while the second part locates the status of this system in the South African judicial system. The third part focuses on assessing the uniqueness of military courts with a particular emphasis on South African military courts. Chapter Three attempts to show that the CODH is not a court of law or a military court in a strict sense of the word. It highlights the difficulties of locating the CODH within the military court system. The conclusions reached in the chapter form the basis for not including the CODH in the assessment of the judicial independence of military courts in Chapter Six.

1.8.2 Part 3: Analysis of the theoretical framework, its application to military courts and assessment of judicial independence of South African military courts

Three chapters are presented in this part, which sets out the theoretical framework for the thesis and applies the framework to military courts. Chapter Four assesses the meaning of judicial independence with a particular focus on South African constitutional law but also draws from international principles and foreign case law where appropriate. Chapter Five discusses the applicability of the right to be tried by an independent and impartial tribunal to military courts from an international perspective. In writing this part of the thesis, I have, in the background, sought to assess whether the uniqueness of the military environment justifies a different set of standards for the judicial independence of military courts. The chapter also analyses developments at the United Nations (UN)

specifically aimed at universal regulation of military tribunals. The standards discussed in chapters four and five are applied in Chapter Six to assess whether South African military courts meet such standards.

1.8.3 Part 4: Proposed model of judicial independence for South African military courts and conclusion

This part of the thesis consists of two chapters. Chapter Seven focuses mainly on addressing the flaws identified in Chapter Six. Comprehensive suggestions on ways of improving the judicial independence of South African military courts are made. The chapter seeks to craft a suitable model of judicial independence for South African military courts taking the following into account: principles of constitutional and international law relating to judicial independence and the right to a fair trial; emerging foreign trends; and most importantly, military needs or operational effectiveness of the military. This chapter attempts to answer a wide range of questions relating to various aspects of the independence of military courts.

For example, the following specific questions are dealt with. What level of independence should military courts enjoy in light of the Constitutional Court decision in *Van Rooyen v The State*⁴³? Is

⁴³ (2002) 5 SA 246 (CC). In this case, the Constitutional Court followed a controversial approach to judicial independence of lower courts when it accepted a lower standard of independence in relation to magistrates' courts than it requires of the High Courts. It did this for several reasons: (a) that the Constitution provided for a hierarchy of courts and in its view this justifies the different degrees of independence;¹⁵⁴ (b) that higher courts deal with matters which were seen to be 'the most sensitive areas of tension between the Legislature, the Executive and the Judiciary';¹⁵⁵ and (c) that the increased level of institutional independence at the higher level was justified because the High Courts are in themselves a means of ensuring and guarding the independence of lower courts through the mechanism of judicial review. The central argument of the Constitutional Court suggests that judicial review is the remedy by which the lowered standard of independence is justified. In the context of military courts, this would mean that the remedy to the lower standard of independence of military courts at lower levels is judicial review by

civilianisation of military judges as suggested by the Ministerial Task Team appropriate for the military? Should the military judiciary continue to be separately regulated or be regulated as part of the mainstream judiciary? What is the appropriate procedure for the appointment and removal of military judges? What is the appropriate level of remuneration of military judges including the appropriate authorities to determine the question (financial security)? What should be the security of tenure of military judges? Should they be granted tenure until retirement age or be appointed for a fixed term? If it is for a fixed term, how long should that term be? Should it be renewable? Should they be subject to performance evaluation and eligible for promotion during their appointment? How should military cases be reviewed in the light of problems with the current system of review and problems pointed out by the European Court of Human Rights in relation to the United Kingdom?⁴⁴

Chapter Seven revisits the major questions investigated in this study. It summarises the main findings and conclusions set out in each of the chapters and sets out the key recommendations for the improvement of judicial independence of South African military courts. The final part of the chapter makes suggestions for future research.

There are many aspects which make the study of military courts interesting and challenging. Key among these is their uniqueness set out in the next chapter, among other things. It is the uniqueness and the potential of the military as an instrument of peace and war which have prompted me to pursue a career in the military, and to embark subsequently on the journey undertaken in this study, underpinned by my belief that a fair and robust military justice system is key to achieving high levels of discipline in any defence force—which in turn

the Court of Military Appeals and higher civilian courts. See further (Tshivhase note 1 above) 126-127 on this point.

⁴⁴ See *ibid* 125-126 on this point.

can assist in ensuring stability. This is particularly important on the African continent where military coups are common.

1.9 The meaning of ‘military judge’ in this thesis

The term military judge/s is used in two senses. The primary usage of the term refers to military judges or senior military judges in South Africa as provided for in the Military Discipline Supplementary Measures Act.⁴⁵ The second usage refers to South Africa’s military judges’ equivalence in jurisdictions considered in this thesis. As will be observed throughout the thesis, these officers are generally either referred to as military judges in some countries or judge advocates in others.⁴⁶ The latter could be members of the military or civilians⁴⁷ depending on the jurisdiction. In the case of Australia, a different term is used: defence force magistrates. The context in which the term ‘military judge’ is being used will be determined by the circumstances of the discussion. That said, the term does not refer to ‘lay military members of military courts or courts-martial’.

⁴⁵ Act 16 of 1999.

⁴⁶ Judge advocate is a military term which is used to refer to a military law officer or legal adviser or simply a military judge as is now the case in the United Kingdom. The meaning of the term has evolved over time in some countries. For the purposes of this study, nothing turns on the designation of judge advocate to the extent that they are only appointed to perform military judicial functions. However, questions arise where judge advocates are used to simultaneously perform judicial functions and other legal duties in the military, in such cases, it is unclear whether they hold a judicial office.

⁴⁷ As is the case in the United Kingdom

CHAPTER 2

INTRODUCTION TO THE SOUTH AFRICAN MILITARY COURT SYSTEM: ITS STATUS WITHIN THE SOUTH AFRICAN JUDICIAL SYSTEM AND THE UNIQUENESS OF MILITARY COURTS*

2.1 Introductory remarks

Military courts have a long history in South Africa and the world over. Since their establishment, they have always had certain unique features, and their status within the South African judicial system has been uncertain. This Chapter has three parts. The first part is aimed at giving a brief history of military courts in South Africa and introducing the current military court system while the second part locates the status of this system in the South African judicial system. The third part focuses on assessing the uniqueness of military courts with a particular emphasis on South African military courts.

2.2 History of the South African military court system

The South African military court system has not been through many phases in its life thus far. Although it is not the objective of this chapter to give an exhaustive historical account of the development of the system, an attempt will be made to describe it according to the following periods: the position before 1957 (the reign of the British Imperial Army Act), the South African Defence Act of 1957 and its travails, and finally, military courts in a democratic era (the present period). A substantial amount of time will be spent describing the latter system because this study is concerned with

military courts as currently constituted. There will, therefore, be little emphasis on the first two phases of the system.

2.2.1 The position before 1957: the reign of the British Imperial Army Act

The history of the South African military court system arguably started in 1912 when South Africa enacted its first Defence Act just after the formation of the Union of South Africa in 1910 (Union).¹ The Act was the result of the Imperial Defence Conference held in London in 1911.² However, s 95 of the Defence Act made provision for discipline in the South African military to be meted out in accordance with the relevant provisions of the British Imperial Army Act of 1881 (Imperial Army Act) subject to such adaptations and modifications made by the Governor-General after such shall have been published in the *Gazette*.³

In terms of the Imperial Army Act, there were three types of courts martial over and above a summary trial by a commanding officer.⁴ Those included: a general court-martial consisting of not less than five officers, a district court-martial consisting of not less than three officers, a regimental court-martial consisting of three officers whose president generally had to be an officer not less than a captain, and a summary court-martial consisting of not less than three officers unless three officers were not available in which case it would consist of two officers.⁵ Some of the common features of

* Some descriptive parts of this Chapter have been published in this author's articles as follows: Aifheli Enos Tshivhase 'Military Courts in a Democratic South Africa: An Assessment of their Independence' (2006) 6 *New Zealand Armed Forces law Review* 96, 105-111, 123-126 and Aifheli E. Tshivhase 'Transformation of military courts' (2009) *SA Public Law* 24(2) 450, 451-465.

¹ SA Defence Act 13 of 1912. See B C Stoop *The Law of South Africa* (2005) 270 in this regard. Military court system and military justice system will be used interchangeably in this study.

² Stoop *Ibid*.

³ Section 95(1) of South Africa Defence Act 13 of 1912.

⁴ See ss 47 and 48 of the Army Act, 1881.

⁵ See Army Act ss 47(1) and (4), 48 and 55(2)(a).

these courts-martial are that they were convened on an *ad hoc* basis, the officers were not required to have legal training, they were generally empowered to impose a death sentence, and the findings and sentences imposed by these courts-martial were subject to confirmation by the convening authority.⁶

An interesting feature introduced by the South Africa Defence Act of 1912 was that ordinary courts of the Union had jurisdiction to try any offence committed by any person against the Military Discipline Code; but in imposing punishment for an offence, the court had to ‘take cognizance of the gravity of the offence in relation to its military bearing and have due regard to the maintenance in the Defence Forces of a proper standard of military discipline.’⁷

In 1932 South Africa came up with the Union Military Discipline Code (UMDC) which came into being as a result of the 1932 amendments to the Defence Act (Amendment) and the Dominion Forces Act.⁸ However, Stoop correctly points out that the UMDC was a mere modification of the Imperial Army Act and the rules of procedure made in terms of the same Act.⁹ A look at the UMDC of 1932 shows that it did not introduce any substantial changes to the British Imperial Army Act. The UMDC did not apply to, among others, any members of the South African Naval Service and any members of the South African Permanent Force Reserve.¹⁰ Discipline in the South African Naval service was meted out in terms of enactments and

⁶ Army Act ss 48 and 54.

⁷ Section 97(1) and (2).

⁸ Act 32 of 1932.

⁹ Stoop (note 1 above) 270. In this connection, s 2(1) of that Act provides that ‘[t]hose provisions of the Army Act, 1881 (44 and 45 Vict. C. 58) of the United Kingdom as amended from time to time up to the commencement of this Act, and the rules of procedure made under section *seventy* thereof, as adapted and modified under section *ninety-five* of the principal Act, which by virtue of section *ninety-five* of the principal Act, comprise, at the commencement of this Act, the Union Military Discipline Code, shall, notwithstanding the repeal of section *ninety-five* of the principal Act by this Act, and subject to the provisions of sub-section (3) of this section, continue to apply in relation to the Defence Forces of the Union and to all members thereof, subject to such adaptations and modifications as the Governor-General may, by notice in the *Gazette*, make thereto.’

¹⁰ Defence Act and Dominion Forces Act s 2(3).

regulations for the discipline of the Royal Navy subject to such adaptations and modifications as the Governor-General could by Proclamation in the *Gazette* direct.

The UMDC remained in operation until 1957 when a major consolidation of South African defence laws took place.

2.2.2 The Defence Act of 1957 and its travails

Defence laws were consolidated by the Defence Act of 1957¹¹ which also introduced the Military Discipline Code (MDC). The MDC introduced a fairly comprehensive system of military justice, which, however, still bore close resemblance to the British military justice system. It made provision for numerous military offences and was supplemented by South African criminal law and the law of evidence. Some of the offences provided for in the MDC were as follows: mutiny; desertion; absence without leave; assaulting a superior officer; assaulting or ill-treating a subordinate; using threatening, insulting or insubordinate language; malingering; disobeying lawful commands or orders; causing or allowing a vessel or aircraft to be hazarded, stranded or wrecked; negligently losing kit, equipment or arms; drunkenness on or off-duty; riotous or unseemly behaviour and conduct to the prejudice of military discipline. Most of these offences carried, among others, a sentence of imprisonment.¹²

The MDC applied, among others, to members of the regular force¹³ and also to members of the reserve force when they were rendering service or when liable to render service.¹⁴

¹¹ Act 44 of 1957. This Act has to a great extent been repealed by the Defence Act 42 of 2002. However, the MDC and other provisions relating to military discipline have been retained. See Schedule one to the Defence Act 44 of 1957 in this regard.

¹² However, military courts rarely impose this sentence for minor disciplinary offences.

¹³ Defence Act of 1957, s 104(1).

¹⁴ *Ibid* s 104(2).

Prior to 1999, the MDC made provision for the court-martial system. Six types of courts-martial existed. Those six types included: a general court-martial; an ordinary court-martial; the summary trial courts of a chief of staff; a convening authority; a commanding officer deriving his powers from a convening authority; and a commanding officer with delegated powers.

These courts were convened on an *ad hoc* basis and presiding officers were appointed by the convening authority on the same basis. The Act did not require members of courts martial to be legally qualified. Furthermore, the accused did not have the right of appeal to the High Courts against a conviction and sentence by the ordinary court-martial. Matters could only be taken to civilian courts on review. A classic example of such a review is the case of *Council of Review, South African Defence Force, and Others v Mönnig and Others* where proceedings of a court-martial were challenged on the basis that members of the court were biased.¹⁵

The military justice system briefly described above was subjected to constitutional challenge in *Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others*.¹⁶ This case dealt with the constitutionality of an Ordinary Court-Martial convened in terms of the Defence Act. The Act empowered the convening authority to order the proceedings of an Ordinary Court-Martial to be held in camera. Under that Act, the convening authority could vary, confirm or substitute sentences of an Ordinary Court-Martial.

The High Court held that empowering the convening authority to order the proceedings of an Ordinary Court-Martial to be held in camera amounted to an invitation of arbitrary interference by an executive official with the due process of the Court.¹⁷ The challenged provision was held to be unconstitutional on the basis that it violated the right to a fair trial, which

¹⁵ 1992 (3) SA 482 (A).

¹⁶ 1999 (2) SA 471 (C).

¹⁷ Ibid para 11.

includes the right to a public trial before an ordinary court as provided in s 35(3)(c) of the South African Constitution, 1996 (the Constitution).¹⁸ The High Court also stated that neither the Act nor the MDC required that members of the Ordinary Court-Martial be legally qualified and that this permitted lay members of an Ordinary Court-Martial to convict and imprison people for up to two years.¹⁹ The High Court added that the relevant parts of the Act and the MDC were unconstitutional because they violated s 174(1) of the Constitution which requires a 'judicial officer' to be an appropriately qualified woman or man who is a fit and proper person.²⁰ Furthermore, the High Court held that the fact that the sentence of the court-martial could not be enforced or executed until such finding and sentence had been confirmed by the convening authority allowed executive interference with the judicial process.²¹

By the time the case reached the Constitutional Court for confirmation of the High Court order, the impugned provisions of the Defence Act and the MDC had already been repealed and replaced by a new Act, the Military Discipline Supplementary Measures Act 16 of 1999 (Military Discipline Act or the Act). In the circumstances, the Constitutional Court declined to confirm the High Court order of invalidity because the basis upon which the parties had approached the High Court had disappeared, and, therefore, an order of confirmation of invalidity would have no practical effect on the parties to the litigation.²²

The hasty repeal and replacement of the Act before the case could be heard by the Constitutional Court was rather unfortunate in that it effectively denied the Constitutional Court an opportunity to pronounce on important aspects of the military justice system in a democratic South

¹⁸ Act 108.

¹⁹ *Freedom of Expression Institute v President of the Ordinary Court Martial* (note 16 above) para 18.

²⁰ *Ibid* para 21.

²¹ *Freedom of Expression Institute v President, Ordinary Court Martial* (note 10 above) para 23.

²² *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC) paras 17-18.

Africa. The Court's pronouncements on the system would have probably laid down some fundamental principles which could help shape the military justice system in the modern era.

2.3 Military courts in a democratic South Africa: the Military Discipline Supplementary Measures Act

The adoption of the final South African Constitution in 1996 made it possible for the legislation governing courts-martial to be challenged on the basis of constitutional inconsistency. The Constitution makes provision for constitutional supremacy as opposed to parliamentary supremacy which prevailed prior to the democratic era.²³

The *Freedom of Expression* case represented a turning point in the history of the South African military court system. It resulted in the Military Discipline Supplementary Measures Act which established a completely new system of military justice. The system is now composed of several 'military courts' as opposed to 'courts-martial'.

A brief introduction to the current system of military justice as provided for in the Act, follows. There are four levels of military courts.

2.3.1 Court of Military Appeals

The Court of Military Appeals (CMA) is the highest military court in South Africa.²⁴ Section 8(1) of the Act read with rule 74(1)(b) of the Act's rules of procedure provide for the CMA review powers that are wider than those of the High Court when it sits on appeal. It does not only consider

²³ See s 2 of the Constitution.

²⁴ Military Discipline Act, s 6(3).

cases before it on the record of proceedings but also has the power to allow further evidence.²⁵

When the CMA deals with treason, murder, rape or culpable homicide committed outside the Republic and in the case of offences endangering the safety of forces or offences by a person in command of troops, vessels or aircraft, it must be composed of five members consisting of three incumbent or retired High Court judges, of whom one must be appointed by the Minister of Defence (Minister) as Chairperson.²⁶ The fourth member must be an appropriately qualified officer²⁷ of the Permanent Force. This officer must hold a degree in law and possess appropriate legal experience.²⁸ Finally, the fifth member of the Court must have experience in exercising command in the field in the conducting of operations.²⁹

When it deals with matters other than those referred to above, the CMA is composed of three members.³⁰ Its Chairperson must have the required experience as a High Court judge or a magistrate.³¹ The second member must be an appropriately qualified officer of the Permanent Force who holds a degree in law with appropriate experience.³² The third member must be a person with command experience in conducting field operations.³³ The Act does not require the latter to be legally qualified. This person

²⁵ For a recent consideration of CMA's powers see *Mbambo v Minister of Defence* 2005 (2) SA 226 (T). This case concerned the question whether there was a right of appeal from the CMA to the High Court. The Court held that the CMA was the highest military court and an accused person's right to approach it for review constituted a right to the meaningful reconsideration of the conviction and sentence in accordance with s 35(3)(o) of the Constitution and thus there was no right of appeal from the CMA to the High Court.

²⁶ Military Discipline Act, s 7(1)(a).

²⁷ According to s 1 of the Act, this includes the passing of a departmental course in military law.

²⁸ See Military Discipline Act, s 7(1)(a)(ii).

²⁹ *Ibid* s 7(a)(i), (ii) and (iii). Operational knowledge may be relevant in certain military cases, hence the need to have a member with such knowledge.

³⁰ *Ibid* s 7(1)(b).

³¹ The magistrate must have held that office for a continuous period of not less than 10 years. To date, the Chairperson of the Court of Military Appeals has always been a High Court judge.

³² Military Discipline Act, s 7(1)(b)(ii).

³³ *Ibid* s 7(b)(i), (ii) and (iii).

therefore sits as a layperson and contributes only military field command knowledge.

2.3.2 Court of a Senior Military Judge

The Court of a Senior Military Judge (CSMJ) may try any person subject to the MDC for any offence except murder, treason, rape, or culpable homicide committed within South Africa and may, on conviction, sentence the offender to any punishment that falls within the penal jurisdiction of military courts.³⁴ The sentences include, among others: imprisonment; cashiering; dismissal from the SANDF; detention for a period not exceeding two years; a fine; and reduction in seniority of rank or a reprimand.³⁵

It may try the above-mentioned offences provided they are committed beyond South African borders including contraventions of ss 4 and 5 of the MDC.³⁶ When this Court exercises this jurisdiction, it must consist of three senior military judges.³⁷ It is striking to note that, when the Court exercises jurisdiction in respect of the above offences outside South Africa, it is empowered to impose any sentence of imprisonment. The CSMJ clearly has extensive powers.

The Court is presided over by an officer of a rank not below that of colonel or its equivalent and with not less than five years of appropriate legal experience, and a military assessor.³⁸ The officer must be assigned as a Senior Military Judge by the Minister of Defence on the recommendation of the Adjutant General (AG).³⁹ He or she must hold a degree in law and be

³⁴ *Ibid* s 9(2).

³⁵ Section 12 of the Military Discipline Act.

³⁶ Endangering the safety of the forces and offences relating to the command of the forces, vessels or aircraft.

³⁷ Military Discipline Act, s 9(3).

³⁸ *Ibid* s 9(1)(a). Military assessors are generally appointed at the instance of an accused person. The military assessor system is rarely used in practice.

³⁹ *Ibid* s 14(1)(b). The AG is responsible for the overall management of the military justice system and the military legal services: s 28 of the Military Discipline Act.

‘appropriately qualified’.⁴⁰ The appointee must also be a fit and proper person.⁴¹

Assignments for a military judicial office are usually fixed for a specific period or coupled to a specific deployment, operation or exercise.⁴²

2.3.3 Court of a Military Judge

Less seniority and experience are required for the Court of a Military Judge. It is composed of an officer of not less than field rank⁴³ having appropriate legal experience, in addition to a military assessor if the accused requests one.⁴⁴ As in the case of the Court of a Senior Military Judge, the appointee must hold a degree in law, be appropriately qualified and a fit and proper person.⁴⁵

The Court of Military Judge has jurisdiction to try any person subject to the MDC other than an officer of field or higher rank⁴⁶ and may not try murder, treason, rape, culpable homicide, or any offence under ss 4 and 5 of the MDC.⁴⁷ It may, on conviction, sentence the offender to any punishment referred to in s 12 of the MDC, subject to a maximum sentence of imprisonment for a period of two years.⁴⁸

Having described the various military courts above it might be worth explaining, briefly, the general role of military judges in those courts as provided for in the relevant law before describing the lowest forum within the military court system and other support structures.

⁴⁰ *Ibid* s 13(2).

⁴¹ *Ibid* s 14(2).

⁴² *Ibid* s 15.

⁴³ Major in the Army, Air Force, Military Health and Lieutenant Commander in the Navy.

⁴⁴ Military Discipline Act, s 10(1)(a) and (b).

⁴⁵ *Ibid* s 10(1)(a).

⁴⁶ By contrast, the Court of Senior Military Judge may try a person of a rank higher than itself.

⁴⁷ Military Discipline Act, s 10(1)(a).

⁴⁸ *Ibid* s 10(2).

2.3.4 General duties of military judges

Over and above the common duties associated with judges, military judges also have statutory general duties. These duties are enumerated in s 19 of the Act. However, as will appear further below, most of these duties are a mere re-statement of the common duties of judges.

Military judges are required to be independent and subject only to the Constitution and the law. They must apply the Constitution and the law impartially and without fear, favour or prejudice.⁴⁹ In addition to the relevant constitutional provisions, s 19 provides a basis for judicial independence of military courts. It presents a break with the past where ‘independence’ of officers presiding in courts martial was not guaranteed.

Furthermore, military judges must conduct every trial and all proceedings in a manner befitting a court of justice. In conducting their proceedings, they must ensure that the accused, whether represented or unrepresented, does not suffer any disadvantage because of his or her position or of ignorance or incapacity to examine or to cross-examine witnesses or to make his or her defence clear and intelligible or otherwise.⁵⁰

2.3.5 The Commanding Officers’ Disciplinary Hearing (CODH)

The CODH is the lowest level of military courts. It consists of the commanding officer or an officer subordinate in rank to such commanding officer and of not less than field rank. In the latter case such an officer must be authorised in writing by the relevant commanding officer. Neither the

⁴⁹ This duty is similar to the provisions of s 165(2) of the Constitution which declares that ‘[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’.

⁵⁰ Military judges are also not to express any opinion whatsoever on any matter relating to any case except in prescribed course of proceedings or as may be required by law. They are also responsible for the safe custody of the record of proceedings and of every exhibit produced at a trial.

commanding officer nor his delegated officer needs to possess any legal qualification or be appropriately qualified.⁵¹

A commanding officer may conduct a disciplinary hearing of any person subject to the MDC other than an officer⁵² or warrant officer, who has elected in terms of the Act to be heard by a commanding officer, for any military disciplinary offence, and may on conviction sentence the offender to certain punishments prescribed in s 12(1)(i),(j),(k),(l) and (m) subject to a maximum fine of R600, 00.

The punishments which may be imposed by the CODH are confinement to barracks for a period not exceeding 21 days in the case of a private or equivalent; corrective punishment for a period not exceeding 21 days in the case of a private or equivalent rank; extra non-consecutive duties for a period not exceeding 21 days in the case of any other rank than that of an officer; or a reprimand.⁵³ The CODH deals only with guilty pleas. Cases involving any other pleas are remanded and referred to the appropriate court⁵⁴ which will usually be the CMJ.

In terms of the Act, there is no right to legal representation at the CODH.⁵⁵ The Act only makes provision for a right to consult a lawyer prior to making any election to be heard at a disciplinary hearing.⁵⁶ The constitutionality of that provision may be brought to question in the light of the Constitutional Court decision in *SANDU v Minister of Defence and*

⁵¹ However, the OC or his delegated officer will usually have passed a departmental course in military law as a matter of practice.

⁵² This refers to the commissioned officer starting from second lieutenant and above. All officers are commissioned by the President as the Commander-in- Chief of the SANDF.

⁵³ Military Discipline Act, s 12(1)(i)(j)(k)(l) and (m). No officer may be heard by a commanding officer's disciplinary hearing.

⁵⁴ See Military Discipline Supplementary Measures Act: Rules of Procedure made by the Minister of Defence under s 44(4) of the Act: GNR.747 of 11 June 1999, Rule 65.

⁵⁵ Section 23.

⁵⁶ Section 23(b). Section 11(2) read with s 29(6) of the Military Discipline Act make provision for an accused right to make an election to be heard by a commanding officer or a military judge if the accused is charged with a military disciplinary offence and decides to tender a plea of guilty.

Others.⁵⁷ In this case, the Court held that it is ‘internationally accepted that once trade unions are recognised by an employer, trade union representatives have a right to represent their members in disciplinary hearings.’⁵⁸ The Court also held that ‘the right of representation in grievance and disciplinary proceedings forms part of the right to fair labour practices protected by s 23(1) of the Constitution’ which cannot be limited unless it is reasonable and justifiable to do so.⁵⁹ Following the above-mentioned ruling, there has been some confusion within some quarters in the South African military as to whether this representation is legal or refers to representation by trade union officials at disciplinary proceedings.

On the basis of the above observations, the Court found a regulation which provided that a military trade union representative has the right to ‘assist’ members in grievance and disciplinary proceedings but does not have a right to represent members, to be unconstitutional because the Minister proffered no reason for limiting the right in question in the regulations. It is doubtful if any reasonable and justifiable reason can be advanced for limiting s 23(1) in the context of trade union officials representing their members in disciplinary hearings. Perhaps an argument which could be advanced in favour of the limitation is the established principle that CODH proceedings should take place efficiently without any delay. Furthermore, it could also be argued that in the light of the fact that the CODH deals only with guilty pleas involving relatively minor offences which attract relatively light sentences and the fact that accused persons have access to a lawyer before electing to be heard by the commanding officer, representation by a trade union in actual proceedings is unwarranted. However, the counter to that argument is that representation of the accused in actual proceedings of a disciplinary hearing is critical in ensuring that the accused puts a strong

⁵⁷ 2007 (8) BCLR 863 (CC).

⁵⁸ *Ibid* para 93. This was an application from the Supreme Court of Appeal against the finding that the Constitution did not impose a duty to bargain and the finding of constitutional validity of regulations made in terms of the Defence Act of 2002.

⁵⁹ *Ibid*.

case in mitigation of sentence. There is much more that could be written on either side of the scale but this is not the place for it.

The status of the CODH within the military court system is considered in detail in Chapter Three.

2.3.6 Military judicial review authority

Persons convicted and sentenced by a military court have the right to automatic, speedy and competent review of the proceedings.⁶⁰ Every acquittal or discharge of an accused is final but every finding of guilty, any sentence imposed and every order made by a military court is subject to the process of review by the review authority.⁶¹ Automatic review of proceedings is considered to be an added benefit for accused persons.

Should the accused elect to make representations on the finding or sentence of a military court, the matter is referred to the CMA for review.⁶² Furthermore, the sentences of imprisonment, including a suspended sentence of imprisonment, cashiering, discharge with ignominy, dismissal or discharge from the SANDF cannot be executed prior to confirmation by the Court of Military Appeals.⁶³ All other sentences by a military court are reviewed by the review authority which may exercise the powers conferred on the CMA.

The military review authority exercises enormous power despite the fact that it is not a court of law. It may uphold, vary or substitute a sentence or refuse to uphold a finding and set the sentence and/or finding of a military court aside.⁶⁴ Moreover, a review authority may direct a military

⁶⁰ Military Discipline Act, s 25.

⁶¹ Director of Military Judicial Reviews in consultation with the Chairperson of the Court of Military Appeals determines review counsel policy and issues policy directives which must be observed in the review process: *Ibid* s 26(3)(b).

⁶² *Ibid* s 34(5).

⁶³ *Ibid* s 34(2).

⁶⁴ *Ibid* s 8(1).

court to give written reasons for any ruling or finding.⁶⁵ The finding of the review authority is deemed to be the finding of the court which passed the original sentence or made the original finding or order.⁶⁶ It follows that the review authority, in exercising its review powers, becomes a court of law by fiction. Review officials are neither court officers nor judicial officers. The military judicial review authority is staffed by military law officers referred to as review counsel and headed by the Director: Military Judicial Review. Both officers are assigned by the Minister.

2.3.7 Military Defence Counsel Authority

An accused person before a military court has the right to legal representation at state expense.⁶⁷ In addition an accused person also has the right to choose his or her own counsel at own expense. Military defence counsel is assigned should an accused elect to be represented at state expense.⁶⁸ The defence counsel authority functions under the direction and control of the Director: Military Defence Counsel. Defence counsel are assigned by the AG subject to the control of the Minister and must be appropriately qualified, over and above holding a degree in law.⁶⁹

2.3.8 Military Prosecution Authority

The military prosecution authority (MPA) functions under the direction and control of the Director: Military Prosecution Authority.⁷⁰ Military prosecutions are conducted on behalf of the state.⁷¹ The MPA must be

⁶⁵ *Ibid* s 107.

⁶⁶ *Ibid* s 107.

⁶⁷ *Ibid* s 23(a).

⁶⁸ *Ibid* s 23(a).

⁶⁹ *Ibid* s 23(2)(c) and (3)(a).

⁷⁰ *Ibid* s 26.

⁷¹ *Ibid* s 22(1).

generally free from executive or command interference.⁷² Its members are required to assist the court in the administration of justice and to present their cases fairly.⁷³

The military prosecution authority is independent from the civilian (national) prosecution authority though the civilian authority is empowered to prosecute both military and civilian offences committed by persons subject to the MDC.⁷⁴

The MPA is one of the institutions that has been under tremendous pressure in the current system of military justice. It was challenged in *Potsane v Minister of Defence*⁷⁵ on a number of grounds. The first was whether the provisions of the Act conferring authority on military prosecutors to institute and conduct prosecutions in military courts were inconsistent with the provisions of s 179 of the Constitution. Section 179 provides that '[t]here is a single national prosecuting authority in the Republic'. This section creates the office of the National Director of Public Prosecutions (NDPP).

The applicants contended that the section invests the NDPP with exclusive prosecutorial authority, which is infringed by the competing authority conferred on military prosecutors by the Act. According to the argument, prosecutions in military courts should be conducted by or under the authority of the NDPP.

The second contention was that the military prosecutions infringed the right to equality in s 9 of the Constitution.⁷⁶ However, the applicants did not challenge the principle of a separate military justice system with jurisdiction to try and punish them (for both civilian and military offences). The

⁷² *Ibid* s 14(4).

⁷³ *Ibid* s 21(a) and (c).

⁷⁴ However, the civilian prosecuting authority, as a matter of policy and practice, prefers not to exercise this power over members subject to the MDC.

⁷⁵ The *Potsane* matter in the High Court is unreported.

⁷⁶ Section 9(1) provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law.'

constitutional attack was directed at only one component of the military justice system, the prosecuting section.

The High Court found in favour of the applicants. It held that the relevant provisions of the Act conflicted with the Constitution to the extent that they permitted military prosecutions to prosecute civilian offences committed by soldiers in South Africa and accordingly struck down the provisions. The High Court reasoned, among other things, that the words ‘there is’ mandates that ‘there must be’ and ‘single’ means ‘sole’ or ‘one and only’.

The Minister of Defence filed a successful appeal against the decision of the High Court in the Constitutional Court.⁷⁷ The Constitutional Court held that ‘single’ in the context of s 179 does not intend to say ‘exclusive’ or ‘only’ but means to ‘denote the singular, ‘one’.⁷⁸ It stated, further, that ‘[w]here there used to be many, there will now be a single authority. That is consistent with the historical context as well as with the corresponding provisions of the Constitution where the diffused powers of state under the previous dispensation were to be brought under a single umbrella.’⁷⁹

On the equality challenge, the Court held that:⁸⁰

The impugned sections of the Act differentiate between soldiers and other people. Such differentiation is rationally connected to the legitimate government purpose of establishing and maintaining a disciplined military force with a viable military justice system. The ground of differentiation is not one specified in s 9(3) of the Constitution; it applies equally to all members of the SANDF in their capacity as such. This basis of differentiation can have no adverse effect on their human dignity or have any comparable impact on them. ... [t]he differentiation is therefore not unfair discrimination within the meaning of s 9(3) of the Constitution.

I agree with the above conclusion. Establishing and maintaining a disciplined military force is mandated by s 200(1) of the Constitution. The differentiation in question is therefore sanctioned by the Constitution itself and does not adversely affect the interests of soldiers. The Court also stated

⁷⁷ *Minister of Defence v Potsane* 2002 (1) SA 1 (CC).

⁷⁸ *Ibid* para 26.

⁷⁹ *Ibid* para 26.

⁸⁰ *Ibid* para 44.

that for civilian prosecutors, even one attached to the particular military unit but not forming part of the command structure, to be making prosecutorial decisions which take account of military policy considerations would be unfair to both the prosecutor and the accused.⁸¹ *Potsane* is clearly a landmark case for the military justice system in South Africa and other jurisdictions will also probably find it instructive. The case affirmed the need for and the continued existence of a separate military justice system.

2.4 The status of the South African military court system within the South African judicial system

The status of military courts within the South African judicial system has always been uncertain. The position is no different in the new dispensation. The difficulty is informed by the fact that military courts have always operated as a 'judicial' entity separate from the civilian judicial system due to their uniqueness as will be highlighted further below. The separate existence of military courts raises questions whether these courts are really courts, and are part of the South African judicial system in the new constitutional scheme. These questions will now be the focal point. As will be seen during the course of discussion, the answers to these questions have implications regarding the applicability of the principle of judicial independence to military courts.

2.4.1 Military courts and the judicial authority of the Republic of South Africa

In the new dispensation, the actual position of military courts within the South African judicial system can only be ascertained by analysing the relevant constitutional provisions and the legislation establishing these courts. Section 165(1) of the Constitution provides that '[t]he judicial

⁸¹ *Ibid* para 40.

authority of the Republic is vested in the courts.’ Furthermore, s 165(2) stipulates that these courts are ‘independent and subject only to the Constitution and the law...’.

In the old dispensation, the question whether courts-martial (as then styled) were courts of law was answered in the affirmative by the Appellate Division (as it then was) and was also considered by two writers. This question will therefore not be entertained in detail here save to highlight the conclusions reached by the authorities in question and to comment briefly on the status of current military courts. Botha looked at the question in the context of the following tests for judicial acts:

Is there a legal dispute or uncertainty as regards rights, duties et cetera? Is there a finding and application of the law to existing facts and duties – in other words, an adjudication in the formal sense? Does the organ performing the act possess the formal qualities usually attributed to judicial organs, such as independence and legally qualified members who are part of the judicial organisation in the state? Is the act final and binding? Does the prohibition of *res iudicata* apply?⁸²

Botha concluded that there was little difficulty in finding that courts martial were courts in the fullest sense of the word ‘despite the fact that the officers presiding over the proceedings [were] not professional lawyers; some of them [did] not hold formal legal qualifications at all...’.⁸³ Similarly, Anderson carefully studied the question of legal classification of military tribunals as courts of law and concluded that courts martial were courts of law.⁸⁴ He measured these courts against the so called trademarks of courts such as their composition,⁸⁵ procedure and evidentiary rules⁸⁶ and found them to have attributes similar to those of courts of law in respect to the said trademarks. He stated that the only real stumbling blocks were ‘issues of independence from executive control, conclusiveness of their decisions and

⁸² C. J. Botha ‘Jungle justice and the fundamental rights – military courts in a future constitutional dispensation’ (1994) 17 *African Defence Review* 1, 3.

⁸³ *Ibid.*

⁸⁴ G.C. Anderson *The legal classification of military courts as courts of law* (1988) Unpublished LL M Thesis, University of Pretoria 144.

⁸⁵ In this respect, the decisive issue is the independence of presiding officers from executive control.

⁸⁶ With regard to this factor, the more strictly the body complies with the procedural and evidentiary rules employed by traditional courts, the more likely it will be conferred with court status (see Anderson note 84 above 139).

the lack of statutory provisions for appeal to the Supreme Court.⁸⁷ Nevertheless, he took the view that those factors do not sufficiently negate the concept of a fully fledged military judicial system.⁸⁸

Most importantly, the Appellate Division in *Council of Review, South African Defence Force, and Others v Mönnig and Others* clarified the status of courts-martial.⁸⁹ In that case, Corbett CJ stated that '[a]lthough a court martial is composed of military officers, it is in substance a court of law and its proceedings should conform to the principles, including the rules of natural justice, which pertain to courts of law.'⁹⁰ It is worth noting that the authorities discussed above are pre-1994 (before the new era).

As a matter of logic, there should be no difficulty in concluding that the current military courts (CODH excluded) are courts of law in the full sense of the word because these courts have more attributes of courts of law than the previous courts-martial which have been found to be courts of law. There have been some significant improvements to the stumbling blocks which Anderson referred to above. For example, although there is still a great need for improvement (as proposed in Chapters Seven and Eight), the degree of independence of military courts has been raised significantly since the dawn of democracy. Furthermore, as noted already, these courts are now presided over by professional lawyers who hold formal legal qualifications. They clearly resemble attributes of traditional courts in many respects. Moreover, s 19 of the Military Discipline Act requires military judges to conduct all proceedings 'in a manner befitting a court of justice'.

However, answering the question whether military courts are courts of law is not necessarily the end of the matter because s 166 of the

⁸⁷ *Ibid* 144.

⁸⁸ *Ibid*.

⁸⁹ 1992 (3) SA 482 (A). The question in this case was whether there were any grounds for members of a court-martial to recuse themselves on account of institutional bias.

⁹⁰ It can only be assumed that the Corbett CJ was only referring to courts martial and not summary trials or commanding officers' disciplinary hearings.

Constitution makes provision for a specific structure of courts contemplated in s 165. It provides as follows:

The courts are - the Constitutional Court; the Supreme Court of Appeal; the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts; the Magistrates' Courts; and *any other court established or recognised in terms of an Act of Parliament*, including any court of a status similar to either the High Courts or the Magistrates' Courts (emphasis added).

Do military courts form part of the structure of courts above? A brief look at the means by which military courts were created and other constitutional provisions suggests that these courts are part of the courts contemplated in ss 165 and 166 respectively. Military courts are established in terms of an Act of Parliament.⁹¹ This means that they are part of the South Africa judicial system hence subject to the requirement of judicial independence which applies to all courts.⁹²

Furthermore, s 171 of the Constitution provides that '[all] courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.' Military courts function in terms of national legislation and their procedures are provided for in terms of that national legislation.⁹³ Moreover, the Act which establishes military courts provides that military courts are subject to the Constitution and the law.⁹⁴ The Act goes further to embrace some of the principles entrenched in s 165 of the Constitution which deals with the judicial authority in the Republic. For example, s 19 of that Act states, among other things, that military judges must 'be independent and... apply

⁹¹ Military Discipline Act 16 of 1999.

⁹² However, the Criminal Procedure Act 51 of 1977 does not include military courts in its definitions of a lower court and a superior court. This is a legislative rather than constitutional gap. It is also a reflection of the historic separate existence of military courts in South Africa. In the light of some of the difficulties resulting from the unclear status of military courts, Botha (note 82 above) 4 argues that '[l]egislation should confirm and define the status of military courts within the general court structure, perhaps similar to that of the special income tax court.' Even though Botha made this argument in the context of the old system, the discussion above shows that the argument is still valid even under the new system because the situation remains unclear.

⁹³ Military Discipline Act: Rules of Procedure (note 54 above).

⁹⁴ Military Discipline Act, s 19.

the Constitution and the law impartially and without fear, favour or prejudice.⁹⁵ The extent to which these courts meet the requirements of judicial independence is a different question, and one which is addressed in Chapter Seven of this study.

Attention will now briefly turn to the appointment of judicial officers with a view to locating the position of military judges in the constitutional scheme. The Constitution distinguishes between ‘judges’ and ‘other judicial officers’. Judges are appointed through procedures involving the Judicial Service Commission⁹⁶ and ‘[o]ther judicial officers must be appointed in terms of an Act of Parliament...’.⁹⁷ I would argue that military judges are ‘[o]ther judicial officers’ for the purposes of the Constitution because they are not ‘judges’ for the purposes of the Constitution and are appointed in terms of the Military Discipline Act, which is an Act of Parliament as contemplated in s 174(4) of the Constitution. They are not covered by legislation regulating magistrates as ‘other judicial officers’. Simply put, they are not part of the mainstream national legislation regulating the judiciary. This, among other things, has arguably contributed to a huge gap between judicial officers of military courts and those of other courts of similar status with regard to conditions of service and other requirements of judicial independence.

2.5 The uniqueness of military courts

The military is unique in many respects. Accordingly, arguments are often made that structuring the independence of military courts has to be seen in the context of the uniqueness of the military in general and military courts in particular. This uniqueness is often used to argue in favour of

⁹⁵ This duty is similar to the provisions of s 165(2) of the Constitution which declares that: ‘The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’.

⁹⁶ The procedure is laid down in s 174 of the Constitution.

⁹⁷ Section 174(4) of the Constitution.

limited independence of these courts or to justify some other aspects of the military court system. For example, this was done (albeit indirectly) by the Lesotho Court Martial in *Sekoati and Others v President of the Court Martial and Others*.⁹⁸ The uniqueness argument was also, in addition to other factors, relied on by the Constitutional Court of South Africa to justify the separate existence of the military prosecuting authority in the case of *Potsane*;⁹⁹ but the argument failed in *Freedom of Expression Institute v President, Ordinary Court Martial*¹⁰⁰ where an attempt was made to justify the lack of independence of South African courts martial (as then styled). In this case, it was argued that ‘...the institution of a court martial is known all over the world, and should therefore not be tampered with.’¹⁰¹

That said, the uniqueness of the military cannot be denied. One does not have to go very far to observe the unique nature of this organisation. The nature of the employment relationship between the defence force and its members demonstrates the uniqueness of the military establishment. Its members are criminally liable for breaches of the Military Discipline Code and may be sentenced to imprisonment. This type of strict discipline is not ordinarily found in civilian settings. In *South African National Defence Union v Minister of Defence and Another*, O’Regan J described the employment relationship between the defence force and its members as ‘...unusual and not identical to an ordinary employment relationship.’¹⁰² Kriegler J sums it up when he says that ‘[a]lthough the overarching power of the Constitution

⁹⁸ *Sekoati and Others v President of the Court Martial and Others* 2000 (12) BCLR 1373 (LesCm). This case dealt with the question whether the court-martial in Lesotho was independent and impartial in the context of the Constitution of that country. The Court stumbled with the question, in the end concluding that the Constitution did not require courts-martial to be independent but also stating that, in any event, the courts were actually independent. On appeal, the Court of Appeal of Lesotho reached similar conclusions in *Sekoati and Others v President of the Court Martial and Others* 2001 (7) BCLR 750 (Les).

⁹⁹ Note 77 above.

¹⁰⁰ Note 16 above.

¹⁰¹ *Ibid* para 29.

¹⁰² 1999 (6) BCLR 615 (CC) para 27. This case concerned the question whether it is constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions. The Court answered the question in the negative and thereby set a new precedent in South Africa.

prevails and although the Bill of Rights is not excluded, the relationship between the SANDF and its members has certain unique features.’¹⁰³

A brief description of those unique aspects of South African military courts as currently constituted and more generally follows.¹⁰⁴

Perhaps the obvious starting point is the uniqueness of their purpose. In the course of making a ruling on the independence of the Canadian military court system in *R v Genereux*, the Canadian Supreme Court observed that ‘...the reasons for the existence of such a parallel system of courts provide guides as to the system’s proper limits.’¹⁰⁵ I agree, and will now consider the purpose of the system.

Ordinary courts and military courts exist to serve two different purposes.¹⁰⁶ Ordinary courts exist to combat and prosecute crime while military courts are created primarily for the maintenance of military discipline both at times of peace and at times of war.¹⁰⁷ More specifically, s 200(1) of the Constitution provides that the defence force must be structured and managed as a disciplined military force. Military courts play a central role in the maintenance of discipline in the defence force.

That said, these courts do not focus exclusively on the maintenance of military discipline because the commission of crime by a soldier involves both elements. This is recognised in s 105 of the Defence Act of 1957 which requires a civilian court when considering sentence for an offence under that Act or the MDC ‘to take cognisance of the gravity of the offence in relation to its military bearing...’¹⁰⁸ This means that adjudicatory considerations are

¹⁰³ *Minister of Defence v Potsane* (note 77 above) para 31.

¹⁰⁴ Most of these features apply to military courts of many other jurisdictions the world over including Canada, United Kingdom, New Zealand, United States, and Australia.

¹⁰⁵ (1992) 1 S.C.R. 259, 288.

¹⁰⁶ *Ibid* 25.

¹⁰⁷ In this connection, s 2(b) of the Military Discipline Act provides among others that ‘the objects of the Act are to... – (b) create military courts in order to maintain military discipline.’ See also *Minister of Defence v Potsane* (note 77 above) para 38. See more expansive remarks by the Canadian Supreme Court on the purpose of the military court system in *R v Généreux* (note 105 above).

¹⁰⁸ *Potsane Ibid* para 25.

different when sentencing a soldier, given the imperative of the maintenance of military discipline.

Another example of the uniqueness of military courts related to their purpose is that their primary focus is trial of military offences, which are unique in themselves. The following offences illustrate the point: mutiny; desertion; absence without leave; assaulting a superior officer; assaulting or ill-treating a subordinate; using threatening, insulting or insubordinate language; malingering; disobeying lawful commands or orders; causing or allowing a vessel or aircraft to be hazarded, stranded or wrecked; negligently losing kit, equipment or arms; drunkenness on or off-duty; riotous or unseemly behaviour and conduct to the prejudice of military discipline.¹⁰⁹ According to a dictum by Cullinan J, some of these offences ‘...serve to indicate the irreconcilable difference between civilian and military notions of discipline.’¹¹⁰

As already noted, players in military courts are also unique. Judges, prosecutors, accused persons and sometimes defence lawyers¹¹¹ are all military people who wear military uniform and are subject to the Military Discipline Code. According to Kriegler J, soldiers live and work in a subculture of their own.¹¹² Similarly, Conradie J observed that ‘[d]efence forces the world over function on a very strong loyalty ethic.’¹¹³ As for military judges, their uniqueness becomes more obvious when they are juxtaposed with ordinary judges. Military judges undergo military training and carry a military rank. They may be deployed outside the borders of the country and may also be required to hold court sessions in combat or

¹⁰⁹ Military Discipline Code.

¹¹⁰ *Sekoati and Others v President of the Court Martial and Others* 2000 (12) BCLR 1373 (LesCm) p 1375. For a further illustration of the uniqueness of military offences see *R v G  n  reux* (note 105 above).

¹¹¹ Provided the accused person chooses to be represented by a military defence counsel. See also generally, Peter Rowe (ed.) *The Impact of Human Rights Law on the Armed Forces* (2006) 79-80.

¹¹² *Minister of Defence v Potsane* (note 77 above) para 31.

¹¹³ *M  nnig v Council of Review* (note 89 above).

operational environments. In *Weiss v United States*,¹¹⁴ the Supreme Court made the following interesting observation about military judges in the United States: '[w]hatever might be the case in civilian society, we think that the role of military judge is "germane" to that of military officer.' This illustrates, further, the special role of military judges.

The post-conviction and sentencing process is also unique in the sense that every conviction and sentence by a military court is subject to automatic review.¹¹⁵ In the civilian court system, review of sentences is not the rule but exception.¹¹⁶

Another interesting feature of military courts is that they have extra-territorial jurisdiction in the sense that they can sit anywhere in the world.¹¹⁷ The same cannot be said of civilian courts. Their powers only extend to the borders of the country. This places military courts in a unique position. Extra-territoriality has been held by the Constitutional Court of South Africa to be essential to the functioning of military discipline.¹¹⁸ The SANDF has to have jurisdiction over its members wherever in the world they may be stationed.¹¹⁹

Finally, in the context of judicial independence, military courts do not only have to be independent from the executive (civilian) but from the military chain of command as well. This makes matters more complicated given the hierarchical nature of the military. In the South African context, although the military command is broadly part of the executive, the former

¹¹⁴ 510 U.S 163 (1994). In this case, military judges escaped attacks of lack of independence. The United States Supreme Court protected them by mainly using arguments relating to the long history of uniqueness of courts-martial.

¹¹⁵ See the description of the review process already discussed in this chapter.

¹¹⁶ See Criminal Procedure Act 51 of 1977 s 302 for the limited circumstances where a sentence of a magistrate's court is subject to an automatic review by a High Court judge.

¹¹⁷ Section 5 of the Military Discipline Act. This is also true in many other jurisdictions the world over.

¹¹⁸ *Minister of Defence v Potsane* (note 77 above) para 24.

¹¹⁹ See *ibid.*

can be constitutionally distinguished from the latter for purposes of this thesis.¹²⁰

2.6 Concluding remarks

The South African military court system has been through three phases. The first phase was dominated by the application of British military law. In the second phase, South Africa tried to come up with its own ‘unique’ system in 1957 which operated unchanged and without major difficulty for decades. With the dawn of the democratic era, the third phase of the system was inevitable. This phase was triggered by the *Freedom of Expression* case. During the same period, the landmark case of *Potsane* affirmed the separate existence of the military court system in the democratic era. However, as already suggested in Chapter One, the system still faces some challenges.

The second part of this chapter has looked at the status of military courts within the judicial set up of the Republic of South Africa. It has found that military courts are courts of law and part of the judicial system of the Republic. The conclusion reached is that the constitutional requirement of judicial independence applies to military courts

Another central observation of this chapter is that, although South African military courts have recently witnessed radical changes, many unique features can still be identified. The key unique features are: the purpose of the military court system and the environment within which it functions, the players involved in the system, the post conviction process and the fact that they have extra-territorial jurisdiction. This uniqueness, sometimes coupled with other factors, has, in many cases, allowed military

¹²⁰ See s 202(1) of the Constitution which provides that ‘[t]he President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Command of the defence force.’ In the same provision, reference is made to the military command which must be appointed by the president as head of the national executive.

courts to escape fair trial and judicial independence standards in a number of jurisdictions.

At the same time, it has also been demonstrated that things are not static with military courts. In other words, the dawn of democracy and advances in human rights discourse are facilitating challenges to traditional notions of military courts. While the uniqueness of the military is still intact, the uniqueness of military courts can be described as ‘changing’ given the constant challenges faced by these courts. The new military court system resembles the ordinary criminal justice system in many respects. It can be expected to get even closer to the ordinary criminal justice system when it is once again overhauled in the near future in order for it to be more compliant with fair trial and judicial independence standards. As Rubin points out ‘even the military community’s ‘need’ to be different from civilian society in order to maintain its perceived collective good may no longer prevail in the face of certain human rights...claims.’¹²¹ Finally, as will appear in the next chapter, the emerging questions about the character and the process of the CODH is further testimony of the changing uniqueness of the military justice system.

¹²¹ G.R. Rubin ‘United Kingdom Military Law: Autonomy, Civilianisation, Juridification’ 2002 62 *Modern Law Review* 36, 39.

CHAPTER 3

THE COMMANDING OFFICER'S DISCIPLINARY HEARING AND ITS STATUS WITHIN THE SOUTH AFRICAN MILITARY COURT SYSTEM

3.1 Introductory remarks

The status of the Commanding Officer's Disciplinary Hearing (CODH)¹ within the military court system described in the previous chapter is not entirely clear. The relevant legislation classifies it as a military court alongside the court of a military judge and senior military judge. This is despite the fact that the CODH is fundamentally different in terms of its attributes, composition and character. The aim of this chapter is to show that the CODH is not a court of law or a military court in the strict sense of the word. I argue that it is in fact not meant to be a court of law in substance despite the fact that the relevant Act classifies it as part of the military court system. Furthermore, the chapter suggests that the Constitution sanctions the idea that the CODH should not operate as a court of law in substance. The arguments proffered in this chapter form the basis for not including the CODH in the assessment of the judicial independence of military courts in Chapter Six.

3.2 The commanding officer's disciplinary hearing and attributes of a court

The CODH was described in some detail in Chapter Two, and this need not be repeated here save to highlight a few important points. The Military Discipline Act classifies the CODH as part of the hierarchy of the military court system.² It is at the lowest level of 'military courts'. It consists of the commanding officer or an officer subordinate in rank to such

¹ In this Chapter, CODH and summary trial will be used interchangeably depending on the context, for reasons which will be given further below.

² Section 6(1) of the Military Discipline Act.

commanding officer and of not less than field rank. In the latter case such an officer must be authorised in writing by the relevant commanding officer to preside. Neither the commanding officer nor his delegated officer needs to possess any legal qualification or be appropriately qualified.

The classification of the CODH as a court or military court is at least questionable. This issue has been studied by Anderson albeit relating to the system which existed during the pre-democracy era.³ I am in general agreement with the conclusion reached by Anderson, and do not wish to repeat his arguments save to emphasise certain key points and to add a few aspects to the debate.

In his study, Anderson considered, among other things, whether ‘summary trials’ (as then styled) were courts of law by evaluating them against what are referred to as the ‘trademarks of courts.’⁴ These include two groups of factors. The first concerns the composition of tribunals.⁵ The key aspect in relation to this factor is the independence of the body from its administrative department.⁶ The second group of factors relates to the procedural and evidentiary rules used by the body concerned. With regard to the latter, ‘[t]he more strictly the body complies with the procedural and evidentiary rules employed by traditional courts, the more likely it will be conferred with court status.’⁷ Anderson concluded that the composition of a summary trial ‘negates the notion that these bodies are courts of law.’⁸ He explained that ‘[i]n a real sense, the bench has an interest in the outcome of the trial.’⁹

Changes made to the military justice system in 1999 regarding summary trials did not break away from the key features of summary trials or the CODH. The trial officer is still the superior officer of the accused, they

³ G. C. Anderson *The legal classification of military courts as courts of law*, (1988) Unpublished LL M Dissertation, University of Pretoria 139

⁴ *Ibid* 139.

⁵ *Ibid*.

⁶ *Ibid*.

⁷ *Ibid*.

⁸ *Ibid* 142.

⁹ *Ibid*.

still follow a relatively simple procedure, and their jurisdiction is still limited to minor military offences and guilty pleas. Furthermore, legal representation is still generally not permitted. This means that the conclusion by Anderson in relation to the old system of summary trials is also applicable to the CODH in the new dispensation.

The view that the CODH is not a court of law can hardly be rebutted for a number of reasons. As Anderson points out, commanders have a direct interest in the outcome of any disciplinary hearing; and they convene and adjudicate in such proceedings themselves. On the basis of these alone, the CODH cannot be classified as a court of law by any stretch of imagination.

Moreover, the definition of a military court in the Act suggests that not all 'military courts' are necessarily courts of law in a traditional sense. In terms of s 1 of the Act, a 'military court' means any one of the 'courts' and the 'disciplinary hearing.' In my view, this means that a disciplinary hearing is not actually a court (as its name suggests) but it is a military court only for the purposes of the operation of the Act.

In fact there are South African authorities to the effect that the circumstance that a forum is formally regarded as a court does not necessarily mean it is in substance a court or a court of law even if it discharges functions of a judicial nature. The first of these is *Minister of the Interior and Another v Harris and Others*.¹⁰ In this case, the Appellate Division (as it then was) declared the so-called 'High Court of Parliament' to be only a court in form but not in substance.¹¹ It saw the said 'court' as simply Parliament functioning under another name. Among other important reasons the Court advanced in support of its conclusion, it looked at the fact that no legal qualifications were required for membership of the High Court of Parliament;¹² that the persons, who in their capacity as legislators passed an Act, were empowered in another capacity (as a court of law) to decide

¹⁰ 1952 (4) All SA 376 (A).

¹¹ *Ibid* 385.

¹² *Ibid* 384.

whether the said Act was validly passed.¹³ The court regarded these characteristics as foreign to courts of law.¹⁴ It held further that the fact that Parliament had described itself as a court of law did not alter the fact that the High Court of Parliament was Parliament functioning under the relevant Act and not a court of law.¹⁵

How does the reasoning of the Appellate Division apply in the case of the CODH? As already discussed, the Act does not require commanding officers to be legally qualified, and this is one of the grounds upon which the High Court of Parliament was found not to be a court of law in substance. Furthermore, the fact that commanding officers preside over disciplinary hearings or appoint their subordinates to do so despite the fact that they (commanding officers and their subordinates) have a vested interest in the outcome is something foreign to courts of law, as similarly highlighted by the Appellate Division.¹⁶ The reasoning of the Appellate Division confirms the view that the CODH is not a court of law but simply a commanding officer's disciplinary hearing. The fact that an Act of Parliament formally classifies it as a 'military court' does not detract from the fact that it is in substance not a court of law.

The second authority which falls for consideration is *South African Technical Officials' Association v President of the Industrial Court and Others*¹⁷ which dealt with the identity and status of the industrial court, more specifically whether its status was equivalent to that of the Supreme Court of South Africa. The Act which created the court provided that it would be the function of the industrial court, within the statutorily defined limitations, to perform all the functions 'which a court of law may perform.' The Court ruled that the industrial court was not a court of law despite the

¹³ *Ibid* 385.

¹⁴ *Ibid* 384.

¹⁵ *Ibid* 385.

¹⁶ It may be worth pointing out, however, that according to Rule 63 (Military Discipline Supplementary Measures Act: Rules of Procedure made by the Minister of Defence under s 44(4) of the Act: GNR.747 of 11 June 1999), 'when there are reasonable grounds for believing that there is a likelihood of bias on the part of the commanding officer; or the commanding officer signed as a witness on the accused's election to be heard at a disciplinary hearing, that commanding officer shall recuse himself or herself.'

¹⁷ 1985 (1) SA 597 (A).

fact that it performed judicial functions.¹⁸ Several factors were considered as reasons for the decision, many of which were peculiar to the circumstances of that case, and these will not be dealt with here because of their obvious irrelevance. One of the factors highlighted in support of the court's view was the circumstance that members of the industrial court had an uncertain tenure of office and that this was not compatible with judicial independence.¹⁹ Similarly, in *Freedom of Expression Institute and Others v President of the Ordinary Court Martial NO and Others*, it was held (in reference to an ordinary court-martial) that 'no tribunal or forum which is not independent and impartial will qualify as a court.'²⁰

The CODH is clearly not an independent forum. Officers who preside over the CODH have no security of tenure whatsoever, and this is foreign to courts of law. In fact, it is difficult to even begin to talk about such tenure in relation to the CODH because commanding officers preside over the CODH merely by virtue of their status as commanding officers, and not as judicial officers. These officers are part of the military command, which could be described as an equivalent of the executive branch of government in a civilian setting. In his discussion of the military disciplinary process, Rowe makes a similar observation persuasively when he states that:

Despite the relative formality of proceedings before a senior officer they cannot be classified as a 'court' or he be termed a 'judicial officer' since the commanding officer is responsible for discipline in his unit and is therefore acting in an executive rather than in a judicial manner when he enforces military discipline.²¹

The view expressed above clearly reinforces the arguments proffered so far in relation to the status of the CODH.

¹⁸ *Ibid* 612.

¹⁹ *Ibid*. While the principle expressed by the Court is broadly relevant for our purposes, it must be pointed out that the Court expressed its view in comparison with the tenure of office of judges of the Supreme Court, a circumstance which is not present in the case of the CODH.

²⁰ 1999 (2) SA 471 (C) para 23.

²¹ Peter Rowe (ed.) *The Impact of Human Rights Law on the Armed Forces* (2006) 76. For an attempt at evaluating the independence of the CODH see Michelle Nel *Sentencing Practice in Military Courts* (2012) Thesis submitted for LLD Degree, University of South Africa 239-246 http://uir.unisa.ac.za/bitstream/handle/10500/5969/dissertation_nel_m.pdf?sequence=1 [accessed on 26 July 2012].

That said, more crucial for our purposes is that, in arriving at its conclusion, the Appellate Division in *Technical Officials' Association v President of the Industrial Court and Others*²² drew inspiration from observations in a Privy Council decision emanating from Australia which dealt with the question whether the board of review which was created by a federal statute was a court of law.²³ In that case, it was stated that '[t]he authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power...' The Judicial Committee went on and made the following negative propositions which were quoted with approval by the Appellate Division in *Technical Officials' Association v President of the Industrial Court and Others*:²⁴

1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision.
2. Nor because it hears witnesses on oath.
3. Nor because two or more contending parties appear before it between whom it has to decide.
4. Nor because it gives decisions which affect the rights of subjects.
5. Nor because there is an appeal to a Court.
6. Nor because it is a body to which a matter is referred by another body.

The CODH has all of the above trappings. The commanding officer gives a final decision in the sense that he or she may not review or change his or her own decision. Commanding officers hear witnesses on oath.²⁵ They usually hear contending views between the State and the accused albeit almost always about the nature of the sentence to be imposed because the CODH only hears guilty pleas. There is no doubt that it gives decisions which affect the rights of the parties, and there is an appeal to higher courts. Despite all these attributes, we have learnt from the above authorities that these do not automatically earn the commanding officer's disciplinary hearing the status of a court of law. Something much more substantial is required than mere form. Although the authorities referred to above dealt with different statutes, different subject-matter and different circumstances, the *dictum* and the reasoning advanced in those decisions

²² Note 17 above.

²³ *Shell Company of Australia Ltd v Federal Commissioner of Taxation* 1931 AC 275 (PC).

²⁴ Note 17 above 611.

²⁵ Rule 96(1) of the Rules of Procedure of the Military Discipline Act (note 16 above) which provide that '[e]very person called to testify as a witness before a military court shall give his or her evidence orally and *on oath* and the presiding judge or *commanding officer* shall administer the prescribed oath to such person. (Emphasis added)

are generally relevant to the question whether a body may be said to constitute a court of law.²⁶ The difficulties highlighted with respect to the nature of the CODH are so glaring that it cannot be a court of law by many standards.

However, having dealt with the question whether the CODH, as currently constituted, is a court of law is not necessarily the end of the matter. The next question is what exactly is the status of the CODH or put differently, how should the CODH be characterized? Does the Constitution sanction the idea that it operates not as a court of law? Before answering these questions, let us first consider summary trials in comparative military justice.

3.3 Summary trials in comparative military justice

A comparative overview of the status and nature of summary trials²⁷ may assist in understanding how the CODH should be dealt with in relation to its status and identity. The comparative overview in this section does not include African countries because the laws of the relevant countries are either unclear about the status and nature of summary trials within the military court system, or do not at all mention summary trials.²⁸ The focus will, therefore, be on India, the United States, the United Kingdom, New Zealand and Canada.²⁹ The survey will assess aspects of summary trials with respect to their status, composition, the right to legal representation, and jurisdiction in respect of persons and penalties.

²⁶ See *Technical Officials' Association v President of the Industrial Court and Others* (note 17 above) 611 where the Court applied the same analogy.

²⁷ In many jurisdictions the commanding officer's disciplinary hearing is referred to as a summary trial or summary court-martial. In this part of the chapter, the expressions 'summary trials' and 'summary courts-martial' are used interchangeably. In the old dispensation, the CODH in South Africa was loosely referred to as a summary trial because commanding officers were empowered to summarily try any person subject to the military discipline code (see s 62 of the first schedule of the repealed Defence Act 44 of 1957).

²⁸ The countries that could have been considered are Zimbabwe (Defence Act Chapter 11:02) and Tanzania (Military Court Act, 1964).

²⁹ Australia has not been included in this survey because temporary summary proceedings were in existence at the time of writing following a decision of the Australian High Court which declared the Australian Military Court unconstitutional: *Lane v Morrison* (2009) 239 CLR 230.

In the United States, summary courts-martial are part of the hierarchy of military courts,³⁰ as is the case in South Africa. They consist of one commissioned officer, usually a non-lawyer, who presides on issues of law and also as finder of fact (jury). Summary courts-martial are generally convened by a commanding officer of a unit but the presiding officer does not necessarily have to be the commanding officer.³¹ They have world-wide jurisdiction over any person subject to the Uniform Code of Military Justice (UCMJ) except officers, cadets and midshipmen, for any non-capital offence;³² but no one may be brought before a summary court-martial without their consent.³³ Summary courts-martial may impose any punishment not forbidden by the UCMJ 'except death, dismissal, dishonourable or bad-conduct discharge, confinement for more than one month, hard-labour without confinement for more than 45 days, restriction to specified limits for more than two months'.³⁴ Furthermore, they may also not impose 'forfeiture of more than two-thirds of one month's pay'.³⁵ The accused does not have the right to legal representation at summary courts-martial.³⁶ However, the accused may be permitted to be represented by a qualified civilian counsel in certain circumstances – that is 'if such appearance will not unreasonably delay the proceedings and military exigencies do not preclude it'.³⁷ That said, it is the function of a summary-court officer to ensure that the interests of both the government and the accused are safeguarded and that justice is done.³⁸ This means that the

³⁰ Art. 16 of the Uniform Code of Military Justice which lists summary courts-martial alongside general courts-martial and special-courts martial. The latter two courts have wide powers and are presided over by military judges. Summary courts-martial must be distinguished from non-judicial punishment which may be imposed by a commanding officer to any military personnel including officers. The latter appears to be less formal compared to summary courts-martial or the CODH. See § 815. art.15 for detail about non-judicial punishment. At a formal (legal) level, non-judicial punishment has no equivalence in South African military law.

³¹ See art. 24 read with art. 25 of the UCMJ.

³² Art. 13 & 20 of the UCMJ .

³³ Art. 20 of the UCMJ.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ See Rule 1301(e) of the Rules for Courts-Martial (R.C.M).

³⁷ *Ibid.*

³⁸ Rule 1301(b) of R.C.M.

summary-court officer ‘acts not only as judge and jury, but also as the prosecutor and defence counsel.’³⁹

Quite correctly, Huestis points out that ‘a summary court-martial is a ‘trial’ in name only’ which falls well short of American expectations of criminal justice when measured by constitutional due process standards, and rightly sees a summary court-martial as ‘an important command tool.’⁴⁰

In the Indian Army, there are four kinds of courts-martial.⁴¹ Summary courts-martial are the lowest level of courts-martial.⁴² These courts may be held by the commanding officer of any corps, department or detachment of the regular Army.⁴³ The commanding officer alone constitutes the court.⁴⁴ From this, it is very clear that Indian summary courts-martial are the sole domain of the commanding officers. These ‘courts’ may try any person subject to the Indian Army Act and under the command of the officer holding the court.⁴⁵ There are, however, a few exceptions. The following persons may not be tried by a summary court-martial: an officer, junior commissioned officer or warrant officer.⁴⁶ As for their penal jurisdiction, Indian summary courts-martial have more powers than American summary courts-martial. They may pass any sentence which may be passed under the Indian Army Act with the exception of the following: a sentence of death or transportation, or of imprisonment for a term exceeding three months or one year depending on the rank of the officer holding the hearing.⁴⁷ The accused

³⁹ Bradley Huestis ‘The Art of Trial Advocacy: Summary Court-Martial: Using the Right Tool for the Job’ (2002) July *Army Lawyer* 52. For another brief description of summary courts-martial in the United States see also Michael Gilbert ‘Summary Courts-Martial: Rediscovering the spumoni of military justice’ (1996) 39 *A.F.L. Rev.* 119.

⁴⁰ *Ibid* 56.

⁴¹ Section 108 of the Army Act 46 of 1950 hereinafter referred to as the Indian Army Act.

⁴² Other courts-martial are general courts-martial; district courts-martial; and summary general courts-martial. India has retained the old British model of having a separate military justice system for each arm of service (Air Force; Navy; and the Army). In the Air Force only three types of courts-martial are provided for. Strikingly, the Air Force Act 45 of 1950 makes no provision for the summary court-martial. See s 109 of the Act. For a concise explanation of the differences between the three arms of services in India, see Umesh Jha (ed.) *The Military Justice System in India: An Analysis* (2009) 280-282.

⁴³ Section 116 of the Indian Army Act.

⁴⁴ *Ibid*.

⁴⁵ Section 120(3) of the Indian Army Act.

⁴⁶ *Ibid*.

⁴⁷ *Ibid* s 120(4).

does not have a right to elect trial by a court-martial. However, there are some high court decisions in India to the effect that a summary court-martial must only be convened where the exigencies demand an immediate and swift decision without which the situation will indubitably be exacerbated with widespread ramifications.⁴⁸ In other words summary courts-martial must be held only as an exception, not the rule. Furthermore, the accused does not have the right to legal representation except that 'the accused is entitled to have the services of a 'friend' who may be any person whose services the accused may be able to procure.'⁴⁹ This person can only advise the accused but may not participate in the actual proceedings.⁵⁰

Commenting on India's summary court-martial, Jha points out that a sentence imposed at a summary trial is a non-judicial punishment because the officer conducting the proceedings is not a court and the trial is by a summary proceeding.⁵¹ In the light of several peculiar procedural inadequacies⁵² and the arbitrary nature of the way in which summary trials are conducted in India, Jha calls for an urgent need to abolish summary courts-martial.⁵³ However, it must be said that, in his analysis, Jha acknowledges the importance of summary trials and to an extent supports the reform of summary trials elsewhere in his work.⁵⁴ In my view, the reform of these institutions is more desirable than abolition given their importance.

In the Indian Navy, there is no summary court-martial in a formal sense but a commanding officer is empowered to summarily try and punish any person other than an officer for a non-capital offence.⁵⁵ Commanding officers are not empowered to award a punishment of imprisonment or

⁴⁸ See Umesh Jha (note 42 above) 231 for a discussion of these.

⁴⁹ *Ibid* 229.

⁵⁰ *Ibid* 229 in reference to Army Rules 1954.

⁵¹ *Ibid* 178.

⁵² For example, lack of access to defence counsel and the right to elect to be heard by a court-martial.

⁵³ The author referred to above contrasts summary courts-martial of India with those of Israel, China, Russia, Canada and South Africa – saying that military justice systems of these countries do not have provisions similar to that of the Indian summary court-martial.

⁵⁴ See Jha (note 42 above) 299.

⁵⁵ See s 93(2) of the Navy Act 62 of 1950.

detention for more than three months, or to award dismissal with disgrace from the naval service.⁵⁶ Although the relevant Act does not use the phrase ‘summary court-martial’ with reference to the powers of the commanding officer, it could be argued that the nature of the powers and the manner in which such powers are exercised, the summary trial by the commanding officer is an equivalent of a summary court-martial in the Indian Army Act.

The United Kingdom has had difficulties with the European Court of Human Rights concerning its military justice system in recent times. In terms of the most recent legislation, summary trials by commanding officers are referred to as ‘summary hearings’.⁵⁷ The words ‘courts-martial’ or ‘court’ are not used at all in reference to summary hearings by commanding officers. As is the case in many other systems, such hearings have a limited jurisdiction in terms of the offences that they may deal with, almost all of which are purely military disciplinary offences.⁵⁸ The punishments which are available to commanding officers are also limited. From the list of punishments provided for, the most severe are the following (in order):⁵⁹ detention for a term not exceeding 90 days; forfeiture of a specified term of seniority or of all seniority; and reduction in rank, or disrating.⁶⁰ It is interesting to note that commanding officers are also empowered to try certain officer ranks summarily.⁶¹ Accused persons have the right to elect trial by a court-martial.⁶² The Act does not provide for the right to legal representation at a summary hearing.⁶³ It is perhaps worth drawing attention to the fact that ‘any person in respect of whom - a charge has been

⁵⁶ *Ibid.* Other tribunals provided for in the Act are a court-martial and a disciplinary court. The latter is composed of three to five officers--the majority of whom shall be officers of the executive branch of the naval service

⁵⁷ Armed Forces Act (c.52), ss 52 & 53 in particular.

⁵⁸ See *ibid* s 53. For example, some of the offences are low flying, hazarding of a ship etc.

⁵⁹ It is probably worth pointing out that the issue of severity of punishment in military context has relative aspects to it in the sense that it would depend on the circumstances and the perspective of the person receiving a particular punishment.

⁶⁰ See *ibid* s 132.

⁶¹ In terms of s 52(3) of the Armed Forces Act an officer below the rank of commander, lieutenant-colonel or wing commander may be heard summarily.

⁶² *Ibid* s 129.

⁶³ The regulations under the old Act (Armed Forces Act of 1996) made provision for the accused to take legal advice before electing to be heard by a commanding officer and to have access to the so-called the accused’s adviser.

heard summarily, and a finding that the charge has been proved has been recorded, may appeal to the Summary Appeal Court against the finding or against the punishment awarded.’⁶⁴ It is novel in contemporary military justice to have a special appeal court to consider appeals from a summary trial.

In the recent case of *Bell v the United Kingdom*,⁶⁵ the European Court of Human Rights held that rights of fair trial provided for in Art 6(1) of the European Convention on Human Rights were applicable to summary trials because it considered the penalty imposed by the commanding officer to be sufficiently severe as to render it criminal for purposes of that article.⁶⁶ The rights in Art 6(1) include the right to be tried by an independent and impartial tribunal, which the Court found to have been violated by a summary trial procedure, for obvious reasons.⁶⁷ Although the court was dealing with summary trials under the 1996 Act, the reasoning of the court would also apply to summary trials under the 2006 Act because the two are substantially similar.

Following the case of *Bell v the United Kingdom*, it is possible that detention powers of commanding officers may be severely curtailed in order to avert another challenge before the European Court of Human Rights. A close reading of the above-mentioned case suggests that the United Kingdom does not necessarily have to abolish summary trials to ensure compliance with the Convention, but must rather cut down the detention powers of commanding officers as a possible option. This will most likely ensure non-application of Art 6(1) of the European Convention of Human Rights since summary trials will be rendered completely disciplinary. I revert to the

⁶⁴ *Ibid* s 141. New Zealand has recently introduced a similar court. See Armed Forces Discipline Amendment Act (No 2) 2007, s 118.

⁶⁵ [2007] ECHR 47.

⁶⁶ See paras 42-43. The punishment involved in this case was seven days detention in a locked up cell in the battalion guardroom.

⁶⁷ Article 6(1) of the European Convention on Human Rights provides among other things that ‘[i]n the determination...of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

above-mentioned case later in this Chapter with the view to evaluating its possible influence on the future structuring of the CODH in South Africa.

Attention now turns to Canada, which has, in many ways, been at the forefront of the reform of military justice systems in the world. In Canada, summary trials by commanding officers are not courts-martial as they are not included under the definition of ‘court-martial’.⁶⁸ A summary trial is presided over by a commanding officer or an officer delegated to act as such by a commanding officer or a superior commander if the accused person is a lieutenant-colonel or an officer below the rank of lieutenant-colonel or a non-commissioned member above the rank of sergeant provided certain requirements are satisfied.⁶⁹ As is the case with summary trials already considered thus far, their jurisdiction both in respect of persons and punishment is limited. They may only try an officer cadet or a non-commissioned officer member below the rank of warrant officer for certain offences, notwithstanding whether a guilty or not guilty plea is offered. However, as noted above superior commanders have the authority to try certain officer ranks summarily.

Upon a finding of guilty, only one or more of the following sentences may be imposed: detention for a period not exceeding thirty days; reduction in rank by one rank; severe reprimand; reprimand; a fine; and minor punishments depending on the rank of the accused.⁷⁰ The right to legal representation is not provided for, but the accused is allowed to be assisted by the so-called ‘assisting officer’ appointed by or under the authority of the commanding officer in order to assist the accused at the hearing.⁷¹ It is

⁶⁸ According to s 2(1) of the National Defence Act (as amended) R.S.C., 1985, c. N-5 hereinafter referred to as Canada’s National Defence Act unless the context dictates otherwise, a ‘court martial’ includes a General Court-Martial and a Standing Court-Martial. Of course, it could be argued, albeit cynically, that this definition does not necessarily exclude summary trials. That said, they are part of the definition of service tribunals – which also covers courts-martial. See, once again, s (2)1 of the Act.

⁶⁹ *Ibid* ss 163(1) and (3), 164(1)(a), and 164(3) of the National Defence Act respectively.

⁷⁰ *Ibid* ss 163(3) and 164(4). However, officers delegated to preside over summary trials have reduced powers in respect of these sentences. See s 163(4) for limits in this regard.

⁷¹ See Queens Regulations and Orders for the Canadian Forces Volume II Chapter 108 art. 108.14. In certain circumstances, the rules make provision for the accused to be assisted by an officer of his choosing. However, it is interesting to note that the art. 108.14, Note (B) of the regulations provides that ‘(B) An accused person does not have a right to be

interesting to note that assistance includes speaking for the accused during the trial, something unique among the jurisdictions considered thus far. The presiding officer acts as both judge and prosecutor because he is responsible for ensuring that both the accused and the assisting officer have access to all the information concerning the trial.⁷² Finally, the accused can elect to be heard by a court-martial if he so wishes.⁷³

Among the countries under consideration, New Zealand is the latest country that has ‘voluntarily’⁷⁴ overhauled its military justice system – including summary trials. The new law which introduced sweeping changes to the system came into effect on 1 July 2009.⁷⁵ However, a deliberate policy stance has been taken not to introduce any major changes to the core elements of summary trials by commanding officers.⁷⁶ Summary trials continue to be conducted by commanders, not courts,⁷⁷ and they may hear both guilty and not-guilty pleas. These officers act generally as both ‘prosecutors and judges’ because the law expects them to investigate as well dispose of offences.⁷⁸ However, a commanding officer is assisted by a ‘presenting officer’ assigned by him, and this officer must not be a lawyer.⁷⁹

represented by legal counsel at a summary trial. However, if an accused requests such representation, the officer having summary trial jurisdiction has the discretion to:

- i. permit representation by legal counsel;
- ii. proceed without representation by legal counsel; or
- iii. apply for disposal of the charges against the accused by a court martial.’ (emphasis added).

⁷² See *ibid* art.108.15.

⁷³ Section 163(1)(c) of Canada’s National Defence Act.

⁷⁴ In the sense that there has not been any major challenge to New Zealand’s military justice system as compared to changes in some of the jurisdictions under consideration. For some detail on this point, see Chris Griggs ‘A new military justice system for New Zealand’ (2006) 6 *New Zealand Armed Forces Law Review* 62, 62-64.

⁷⁵ <http://www.nzdf.mil.nz/news/publications/one-force/2/military-justice-system.htm> [accessed on 12 June 2011].

⁷⁶ Chris Griggs (note 74 above) 69.

⁷⁷ See new definition of ‘court-martial’ provided for in the Armed Forces Discipline Amendment Act (No 2) 2007, s 4(4) which does not include summary trials. See also s 103(1) of the same Act which provides that ‘[e]very commanding officer must investigate and dispose of a charge before him or her in the prescribed manner’ which confirms that summary trial is not a court of law in that country. Having said that, the definition of a ‘military tribunal’ in the same Act includes a disciplinary officer, the Summary Appeal Court and the Court Martial. But as noted in *Shell Company of Australia Ltd v Federal Commissioner of Taxation* (note 23 above) a tribunal is not necessarily a court.

⁷⁸ See *Ibid*.

⁷⁹ *Ibid* s 115.

The presenting officer assembles the evidence and presents the case in support of the charge.⁸⁰

As expected, they have a limited jurisdiction in terms of the nature of sentences they may impose, and are empowered to impose a sentence of detention but only on non-commissioned officers.⁸¹ Surprisingly, they have virtually no limits in terms of persons subject to hearing before them, provided the person concerned is subject to the relevant Act.

A commanding officer exercising summary trial powers under the Act has discretion whether or not to grant an accused person the right to elect trial by the Court Martial of New Zealand (hereinafter 'Court Martial'); this discretion is guided by the nature of punishment likely to be imposed by the disciplinary officer.⁸² Finally, accused persons tried summarily are deemed to have waived certain rights in certain circumstances.⁸³ Consequently, they have no right to legal representation,⁸⁴ and most importantly, they also have no right to a hearing by an independent court.⁸⁵

Summary of key lessons from comparative military justice regarding summary trials

The survey of the five countries considered shows that summary trials enjoy many similarities. In three of the five countries surveyed, summary trials are not formally referred to as 'courts-martial' or at least the word 'court' is not used in reference to them.⁸⁶ All of these countries have recently reformed their military justice systems, the most recent being the United Kingdom and New Zealand respectively. They have deliberately maintained

⁸⁰ *Ibid.*

⁸¹ *Ibid* s 117Y(3).

⁸² *Ibid* s 117L(1) and (2).

⁸³ *Ibid* s 117ZD.

⁸⁴ However, it must be pointed out that the accused before a summary hearing must be assigned a defending officer to assist him or her in the preparation and presentation of his or her case and to act on behalf of the accused, and this officer must not be a lawyer (*ibid* s 114).

⁸⁵ *Ibid.*

⁸⁶ These are the United Kingdom, Canada and New Zealand.

the *status quo* regarding the identity of summary trials except making a few procedural modifications. On the other hand, the United States and India regard summary trials as part of courts-martial, albeit that in the case of India the picture is mixed because the Navy has a unique system. However, the analysis of South African summary trials shows that nothing much can be read into the fact that summary trials are formally courts-martial or courts because they are in substance not courts.

In all the countries studied, summary trials are essentially the sole domain of commanding officers because they act as both ‘prosecutors and judges.’ However, New Zealand, one of the countries on the cutting edge of reform of military justice, has introduced an additional element to the composition of summary trials – that is the ‘presenting officer’ who assists the commanding officer in the presentation of a case. Other countries may very well have informal arrangements to this effect but their primary military laws do not indicate this.

With respect to the jurisdiction of summary trials, almost all of the countries impose restrictions concerning persons that may be tried and penalties that may be imposed upon a finding of guilty. Each of these countries permits a sentence of detention or confinement (in the case of the United States) at a summary hearing; but only India permits its commanding officers to impose a sentence of imprisonment at a summary trial. Periods of detention or confinement range from thirty days to ninety days. Given the pressure exerted on the Indian military justice system and events elsewhere in the world, it is unlikely that commanding officers will retain their power to impose a sentence of imprisonment in the event that the government decides to embark on a broad reform of the military justice system in that country. New Zealand breaks with tradition by subjecting *all* its officers to the jurisdiction of summary trials. This is unprecedented. However, the United Kingdom has taken a step in the same direction by subjecting certain officer ranks to the jurisdiction of summary trials, against the norm that summary trials are generally used to discipline non-commissioned officers.

Each of the countries gives a choice to elect trial by a court-martial albeit that this choice is discretionary (on the part of the commanding officer) in the case of New Zealand in certain circumstances.

Finally, none of the countries studied provides for the right to legal representation at a summary hearing as a general rule. Only the United States provides for this right in exceptional circumstances. Lawyers are deliberately kept out of summary trials both at the bench and from the floor. The reason behind this is that summary trials are meant to be a swift disciplinary tool for commanders and the involvement of lawyers in the proceedings will naturally slow things down. However, there is a trend among some countries to strengthen the assistance available to the accused at a summary hearing. New Zealand, Canada, and the United Kingdom are among the most recent examples. This is because there is an increasing demand for summary trials to be fairer in the modern age. As indicated elsewhere, some countries have even gone to the extent of creating specialist appeal courts for summary trials which may help deal with some of the excesses of these forums.

3.4 Determining the status of the CODH within the military justice system of South Africa in the new era

Comparative military justice has shown that countries which have recently reformed their military justice systems have chosen to retain the essential composition and character of summary trials as a matter of 'policy choice'. It is argued that South Africa should do the same. There are good policy reasons for doing this. The effectiveness and efficiency of the armed forces largely depend on their discipline. Sometimes this discipline must be enforced swiftly and immediately by commanding officers. However, the process must be fair and the suggested policy stance must be tested against the relevant provisions of the Constitution as will be attempted further below in this chapter.

In Canada the formal purpose of summary proceedings 'is to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency...in time of peace or armed conflict.'⁸⁷ Similarly, Griggs states (in the context of New Zealand) that '[t]he purpose of summary trials is to provide commanders with a method of dealing expeditiously and simply with less serious disciplinary infractions, whether they be in New Zealand, at sea or in an overseas operation.'⁸⁸ More crisply, Gilbert says that '[t]he summary court-martial...is valuable when [a] military member needs to be taught a swift lesson that will serve as a message to others about to fall off the precipice of good order and discipline.'⁸⁹ If the CODH becomes a court of law staffed by lawyers, the swiftness of enforcing discipline will most likely diminish and commanders will be disempowered. This in turn will compromise the effectiveness of the armed forces.

Determining the status of the CODH will typically revolve around two sets of constitutional provisions. The first relates to provisions regulating security services, in particular s 200(1). At the risk of repetition, it provides that 'the defence force must be structured and managed as a disciplined military force.' As already noted in Chapter Two, s 200(1) is the constitutional justification for the separate existence of the military justice system.

Based on the above-mentioned provision, it could be argued that the Constitution requires commanders to have direct control over certain military disciplinary structures such as the CODH as they are responsible for the defence force which they are required to 'manage' as a 'disciplined' force. The corollary is that any attempt to remove commanders completely from military disciplinary structures such as the CODH could be constitutionally offensive. In the modern age, the influence of commanders in traditional military courts has been significantly (and rightly) eroded. The

⁸⁷ Queens Regulations and Orders for the Canadian Forces (note 71 above) art. 108.2.

⁸⁸ Note 74 above 66.

⁸⁹ Note 39 above 119.

CODH remains the only formal tool for commanders to exercise discipline over their subordinates, and its reform should not lead to it being elevated to a court of law because commanders will no longer have any role in formal military disciplinary structures. This would be the position because all courts are required to be judicially independent, and any military court presided over by a commanding officer cannot meet the requirements of judicial independence.

However, there is another way of looking at this, which is that s 200(1) cannot be read in isolation. In practical terms, this refers to the idea that when commanders enforce discipline in the defence force, they must do so in a manner that does not unjustifiably offend applicable constitutional rights and international law. This argument draws direct support from s 199(5) of the Constitution which provides that '[t]he security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.'

This brings me to the second set of constitutional provisions relevant in this discussion. They are all in the Bill of Rights. These are the right to a fair trial, in particular 'the right to a public trial before an ordinary court'⁹⁰ 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'⁹¹ and the just administrative action clause.⁹² The possible application of these provisions to the CODH will be considered in an attempt to classify the status of the CODH.

As will be seen in Chapter Five, the right to a fair trial applies to military courts,⁹³ but there is no South African authority on whether the

⁹⁰ Section 35(3)(c) of the Bill of Rights.

⁹¹ Section 34 of the Bill of Rights.

⁹² Section 33 of the Constitution.

⁹³ See also Aifheli Enos Tshivhase 'Military Courts in a Democratic South Africa: An Assessment of their Independence' (2006) 6 *New Zealand Armed Forces law Review* 96, 97-102 where this author discusses the same point.

above-mentioned right applies to the CODH, in particular the right to a public trial before an ordinary court.⁹⁴ The right to a fair trial applies to every accused person.⁹⁵ In a situation where one claims the rights in s 35(3) the question would be whether the person concerned is an accused person within the meaning of that section. This question is also closely linked to whether the proceedings in question are criminal. This was the approach followed in *Nel v Le Roux and Others*,⁹⁶ and in *National Director of Public Prosecutions v Philips and Others*.⁹⁷ By way of summary, the reasoning employed in these two cases establishes the following: that fair trial provisions apply to an accused person facing a criminal prosecution⁹⁸ and that criminal proceedings must culminate in a conviction and punishment or criminal sentence in order for any person to qualify as an accused person for purposes of s 35(3).⁹⁹ Furthermore, according to *Nel v Le Roux and Others*, whether a particular order constitutes punishment depends on its

⁹⁴ Section 35(3) of the Constitution.

⁹⁵ See s 35(3)(a) of the Constitution.

⁹⁶ 1996 (3) SA 562. This case dealt with the constitutionality of s 205 of the Criminal Procedure Act of 1977 which permits the examination of any person likely to have material or relevant information about any alleged offence. One of the questions the Court had to deal with was whether s 205 proceedings constituted a criminal trial. That provision provides for the recalcitrant witness to be sentenced (by a court) to imprisonment for a period up to two years after the court has only enquired in a summary manner into the examinee's failure or refusal to testify or answer questions. The Court held that '[t]he imprisonment provisions ...constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so; it does not constitute a criminal trial, nor make an accused of the examinee.' (para 11). This meant that the applicant was not entitled to the rights provided in s 25(3) of the Interim Constitution Act 200 of 1993, an equivalent of s 35(3) in the final Constitution, 1996. What influenced the Court to arrive at that conclusion was the fact that the proceedings in question do not result in a conviction and the imprisonment of the examinee is not treated as a criminal sentence as 'after being imprisoned, an examinee becomes willing to testify this would entitle the examinee to immediate release'. (para 11).

⁹⁷ 2002 (4) SA 60 (W) para 40. This case dealt, among other things, with the question whether proceedings relating to an application for a confiscation order in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 flowing from a criminal conviction were criminal or civil so as to trigger the application of certain fair trial rights in s 35(3) of the Bill of Rights. The Court held that the proceedings were civil because the confiscatory order only stripped the criminal of the proceeds of crime and did not punish him or her for it. Although the Court did not definitively answer the question of what constitutes an accused, we can profit from its ratio as it is analogous – especially in relation to the meaning of an accused person and the nature of criminal punishment, which will become more relevant further below.

⁹⁸ With respect to *Nel v Le Roux and Others* (note 96 above), see in particular para 11.

⁹⁹ *National Director of Public Prosecutions v Philips and Others* (note 97 above) para 41 in particular, *Nel v Le Roux and Others* (note 96 above) in particular para 11.

purpose.¹⁰⁰ It only constitutes punishment if its purpose is to punish the offender for his or her crime.¹⁰¹

Do proceedings of the CODH constitute a criminal prosecution culminating in a conviction and punishment or criminal sentence? Strictly speaking, proceedings before the CODH do not constitute a criminal prosecution because the ‘accused’ is not facing a criminal offence but a ‘military disciplinary offence.’¹⁰² Furthermore, in general, the aim of the punishment imposed by the commanding officer is not necessarily to punish the ‘accused’ but to discipline him or her. Kriegler J puts it well when he emphasises the point in *Potsane* that

military discipline is not about punishing crime or maintaining and promoting law, order and tranquillity in society. Military discipline as Chapter 11 of the Constitution emphasises, is about having an effective force capable and ready to protect the territorial integrity of the country and the freedom of its people.¹⁰³

However, proceedings before the CODH are analogous to a criminal prosecution despite the fact that the accused is faced with a military disciplinary offence. I say this for the following reasons. The accused’s guilt or innocence is established on the basis of general principles of criminal liability in South Africa,¹⁰⁴ including the standard of proof—that is proof beyond reasonable doubt. This means that the nature of proceedings before the CODH assumes a criminal character although they are disciplinary proceedings.

Furthermore, despite the fact that its purpose is not necessarily to punish the offender, the maximum sentence that may be imposed by the commanding officer (confinement to barracks for a period not exceeding 21 days)¹⁰⁵ can generally be seen as analogous to a criminal sentence or punishment by those subject to it because it involves a severe deprivation of freedom of an individual in a formal way and for a significant period of time.

¹⁰⁰ Para 42.

¹⁰¹ *Ibid.*

¹⁰² Section 11(2) of the Military Discipline Act which provides that ‘[a] commanding officer may conduct a disciplinary hearing of any person subject to the Code, other than an officer or warrant officer... for any *military disciplinary offence*’. (emphasis added).

¹⁰³ *Potsane v Minister of Defence* 2002 (1) SA 1 (CC) para 38.

¹⁰⁴ See Rule 20 of the Rules of Procedure of the Military Discipline Act (note 16 above).

¹⁰⁵ Section 12(1)(j) of the Military Discipline Act.

The sentence of confinement to barracks is not defined in the Act, but according to Nel, it is currently executed as follows:

1. The member is restricted to the unit lines. He is not detained but his movements after hours are very restricted. Within the unit lines the accused has relative freedom of movement.
 2. The member forfeits the use of the recreational facilities on the unit.
 3. He is easily identifiable because he wears distinguishing clothing.
 4. He is required to move in double march wherever he goes within a unit.
 5. The maximum period of 21 days may be adjusted to fit the offence...
 6. The trial officer may also add variants to the punishment depending on the nature of the offence. Any variation must be documented on the trial documentation. It may include any or all of the following:
 - (i) Reporting to the officer on duty as stipulated;
 - (ii) Punishment drill with or without equipment;
 - (iii) Report in different types of uniform at specified times to ensure the uniform is clean and tidy; and
 - (iv) Stand inspection in his room.
- The period of confinement to barracks starts immediately after the sentence has been announced in open court. (footnotes omitted)¹⁰⁶

From the above, it can be seen that the execution of the sentence of confinement to barracks not only involves the offender's deprivation of movement but also the forfeiture of the offender's normal life within the unit.¹⁰⁷ It also includes other activities which increase the severity of the sentence. Of particular note is the fact the sentenced offender is easily identifiable because he wears distinguishing clothing¹⁰⁸ and is also required to move in double march wherever he goes within the unit.

In my view, an offender serving this type of sentence is in a worse position than someone serving the sentence of detention in a designated facility because everyone in the unit may come across the former in the process of serving the sentence in question.¹⁰⁹ The embarrassment and indignity which the offender may experience on a daily basis in the process

¹⁰⁶ Nel (note 21 above) 392-393. For a brief note of other countries (mainly civil) with a comparable sentence see Georg Nolte and Heike Kriege 'Comparison of European Military Law Systems' 137 in Georg Nolte (ed.) *European Military Law Systems* (2003).

¹⁰⁷ Provided the offender lives within the unit.

¹⁰⁸ According to Nel (note 21 above) 392, this can be seen as a form of stigmatisation and regarded as unconstitutional punishment since it could be degrading.

¹⁰⁹ Of course, this may also depend on the conditions in the detention facility in question.

of serving the sentence could constitute a double punishment. In fact, concern has been raised whether this sentence complies with the objectives of the UN Convention against Torture because it imposes additional duties on and prohibits extra-mural and leisure activities of the offender.¹¹⁰

It can be argued plausibly that the purpose of the punishment described above (given its nature, duration, manner of execution and effect)¹¹¹ is not only to discipline the offender but to punish the offender for his or her crime as well. This means that the sentence of confinement to barracks could be regarded as a criminal sentence or punishment, and the person facing the penalty therefore qualifies as an accused person for purposes of s 35(3)(c) of the Constitution, in line with the reasoning in *Nel v Le Roux*¹¹² and *National Director of Public Prosecutions v Philips*¹¹³ respectively.

The corollary, therefore, is that the accused before the CODH is entitled to a right to a public trial before an ordinary court.¹¹⁴

The conclusion I have reached regarding the application of s 35(3)(c) to the CODH is similar to the view held in Canada and New Zealand on the

¹¹⁰ Nel (note 21 above) 393. Commenting on an analogous sentence, Rowe observes that the 'power to impose an order of detention on an 'employee' (soldier) by his 'employer' (Army authorities) places the armed forces disciplinary process in sharp contrast to any civilian disciplinary system.' P Rowe 'A New Court to Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court' *J. Conflict & Sec. L.* (2003), vol. 8 No 1, 201, 202.

¹¹¹ These factors were considered by the European Court of Human Rights in *Engel and Others v The Netherlands* (1976) 1 EHRR 647 in deciding whether punishments of light arrest, aggravated arrest, and strict arrest constituted deprivation of liberty for purposes of Art 5 of the European Convention of Human Rights. The Court held, by a majority, that the first two forms of arrest did not constitute deprivation of liberty for purposes of Art 5 of the Convention.

¹¹² Note 96 above.

¹¹³ Note 97 above.

¹¹⁴ General support for this conclusion can also be had from the decision of the Constitutional Court held in *De Lange v Smuts* 1998 (3) SA 785 (CC). This case dealt with an application for confirmation of a High Court order declaring s 66(3) of the Insolvency Act 24 of 1936, which authorises a person presiding over a creditors' meeting to imprison a recalcitrant witness, unconstitutional. The Court confirmed the High Court's order only to the extent that it held that s 66(3) is unconstitutional for authorising a presiding officer who is not a magistrate to commit a recalcitrant witness to prison. The Court held (para 74) that '[a]lthough committal to prison under s 66(3) is not incarceration following upon a criminal conviction; it is, from the perspective of the persons deprived of their freedom, analogous.' The Court found this to be an unjustifiable infringement of s 12(1) of the Bill of Rights. Although this case dealt with a different situation its reasoning can be applied analogously.

same point. In Canada, the Office of the Judge Advocate General concluded that '[a] summary trial is... 'by nature' a criminal proceeding' and went further and stated that '[o]nce the 'by nature' test is passed it is irrelevant if the summary trial awards penal sanctions.'¹¹⁵ Following this reasoning and the views held in Canada, New Zealand has decided to take a similar policy position regarding the application of the rights in question in relation to summary trials by commanding officers.¹¹⁶

Similarly, and as already noted, it was held in *Bell v the United Kingdom*¹¹⁷ that British summary trials were offensive to Art 6(1) and (3) of the European Convention of Human Rights (the Convention). The most relevant part of that article for our purposes is Art 6(1) which provides that '[i]n the determination... of any criminal charge against him, everyone is entitled to a fair and public hearing... by an independent and impartial tribunal established by law.' The features of this article are similar to those of s 35(3)(c) of the Bill of Rights in the sense that they both refer to an accused person faced with a criminal prosecution, and both provisions entitle the accused to a right to a public hearing before an independent court or tribunal.¹¹⁸ This means, therefore, that the interpretation of the European Court of Human Rights can be relied on with some profit.

One of the critical questions the Court had to consider was whether Art 6 of the Convention was applicable to summary trials. In deciding the question, the Court applied a two legged test which was developed in the earlier cases of the Court. The starting point is whether the offence charged belongs to criminal law, disciplinary law or both.¹¹⁹ In the present case, we have already noted that proceedings before the CODH arguably assume both

¹¹⁵ Office of the Judge Advocate General, Canada, *Summary Trial Working Group Report*, vol. I (2 March 1994) 51 (referred to in Griggs (note 74 above) 71.

¹¹⁶ See Griggs (note 72 above) 69-72 outlining the policy stance adopted recently.

¹¹⁷ Note 65 above. Section 39(1)(b) of the Constitution provides that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum... must consider international law'. It is on that basis that the above-mentioned case and other international cases are considered.

¹¹⁸ Although s 35(3)(c) of the Bill of Rights does not explicitly refer to an independent court, all courts in South Africa are independent in terms of s 165 of the Constitution.

¹¹⁹ Note 65 above, para 35.

a criminal and disciplinary character, which means that the first criterion is met according to the logic of that case.

However, in terms of that case, the supervision of the court in relation to the offence goes further, and takes into consideration the degree of severity of the penalty that the person concerned risks incurring. The court looks at the maximum potential penalty for which the relevant law provides. In *Bell v The United Kingdom*, the Court considered a sentence of detention for a period of 28 days to be a deprivation of liberty which was serious enough to render the charge against the accused to be of a criminal nature which attracts the application of Article 6 of the Convention.¹²⁰

In the case of the CODH, the maximum sentence in respect of deprivation of liberty is confinement to barracks for a period of 21 days. Although the offender is not necessarily under lock and key, this sentence is analogous to the sentence considered in *Bell v The United Kingdom*, especially if it is imposed on an offender who does not ordinarily reside in the barracks in question. The freedom of movement of both offenders is severely restricted except that in the case of confinement to barracks, the offender is not necessarily under lock and key but is required by law to remain within a designated space. Moreover, I have already argued that confinement to barracks is worse than the sentence of detention given the manner in which the former is executed.¹²¹

¹²⁰ Paras 41-42. It may be worth pointing out that some states entered a reservation to the effect that Art 6 of the Convention would not apply to discipline within their armed forces. The United Kingdom did not do so, and hence a number of attacks were launched against its military justice system based on Art 6 of the Convention. There have been calls in Parliament for the United Kingdom to withdraw from the Convention and re-ratify with an appropriate reservation. (see Rowe (note 108 above) 202 highlighting this point)

¹²¹ Compare, however, Nel's view (note 21 above) 215-216 who states that the sentence of confinement to barracks does not constitute serious deprivation of liberty where a member is confined to his living quarters after hours. Furthermore she argues that this sentence is not appropriate for members not living in the single quarters or barracks, such as married members. However, the Act does not say that this sentence can only be imposed on living-in members. As things stand, nothing prevents the court from imposing the sentence on a non-living in member provided facilities exist for the execution of the sentence. In line with the European Court of Human Rights rulings in *Bell v United Kingdom* etc, one has to focus on the maximum sentence risked by the accused for purposes of evaluating the severity of the sentence. This means that the sentence of confinement to barracks must be evaluated on the basis of the worst case scenario risked by the offender. The worst case scenario

That said, in *Engel and Others v The Netherlands (Engel)* the European Court of Human Rights considered a similar sentence (*aggravated arrest for twelve days*) and held (by a majority) that it did not constitute deprivation of liberty or criminal punishment for purposes of Art 5.¹²² This sentence (aggravated arrest) required that while off-duty, soldiers serve the arrest in a specially designated place which they may not leave in order to visit the canteen, cinema or recreation rooms, but they were not kept under lock and key.¹²³ The Court took the view that the punishment of aggravated arrest did not constitute deprivation of liberty or criminal punishment for purposes of Arts 5 and 6 of the Convention respectively¹²⁴ because the soldiers involved remained ‘more or less, within the ordinary framework of their army life.’¹²⁵

In Stavros’s view, the majority of the Court was apparently trying to avoid a heavy judicialization of army discipline as a matter of policy.¹²⁶ He adds further that the conclusion of the Court was not necessarily based on the letter of the Convention or legal considerations but fear of ‘...excessive judicialization of proceedings which remain non-judicial in the majority of

would be a situation where this sentence is imposed on an offender who does not live in the barracks in which he or she has to be confined. In such a situation, the sentence of confinement to barracks is analogous to the sentence of detention. In any event, even if the sentence is imposed on an offender who lives in military barracks, it still constitutes a severe limitation on his freedom because it means the offender cannot spend time outside the barracks for any purpose if he or she wished to do so. Experience has shown that some single living-in members often spend nights out for various purposes. This means that it is incorrect to assume that the sentence of confinement to barracks does not have a severe impact on single living-in members. Moreover, this sentence would be redundant if its imposition did not alter the offender’s situation. A case by case analysis adopted by Nel which only focuses on the ideal situation is, with respect, not helpful. See Nel 391 discussing the ideal situation where she thinks the sentence is suited.

¹²² Note 111 para 62. Compare, however, Nel’s view (note 21 above) 215 that the sentence of confinement to barracks is comparable with light arrest instead. Again, with respect, Nel is mistaken because under light arrest, soldiers in *Engel* paras 61-62 were entitled to make use of recreational facilities such as visiting the canteen etc. whereas soldiers under confinement to barracks would not be entitled to make use of such facilities as Nel describes in her thesis. In my view, therefore, aggravated arrest is the appropriate sentence for purposes of comparison with confinement to barracks.

¹²³ *Engel v The Netherlands* (note 111) para 62.

¹²⁴ In the context of South Africa, the equivalent provision would be s 12 of the Constitution.

¹²⁵ *Engel v The Netherlands* (note 111 above) paras 61-62. This was despite the fact that Engel’s arrest prevented him from preparing for his doctoral examination.

¹²⁶ See Stephanos Stavros (ed.) *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (1993) 13.

the States Parties...'¹²⁷ He observes that the need for procedural protection at military disciplinary hearings is clear and the problem remains.¹²⁸

However, in his dissenting opinion, Judge Thór Vilhjálmsson came to a different conclusion—that aggravated arrest is deprivation of liberty within the meaning of Art 5 of the Convention because of its nature and legal character.¹²⁹ He noted that servicemen undergoing aggravated arrest were not allowed the same freedom of movement as other servicemen.¹³⁰ Furthermore, Vilhjálmsson went on to note that the servicemen concerned had to remain during off-duty hours in a specially designated place, could not go to the recreation facilities open to others in the same barracks and often slept in special rooms.¹³¹ In addition, the judge also saw the treatment associated with aggravated arrest as punitive.¹³²

The conclusion by Vilhjálmsson that 'aggravated arrest' amounted to deprivation of liberty has been supported by Stavros.¹³³ For reasons already set out above in relation to the sentence of confinement to barracks as a punishment similar to 'aggravated arrest', I align myself with the minority opinion of Vilhjálmsson in *Engel* and the observations by Stavros.

The divergence of views on the characterization of aggravated arrest and similar sentences is not surprising. Given the severity of punishments available to commanders, Rowe observes that '...it may be difficult to draw a clear line between those punishments which might be considered to be criminal and those which, although described as disciplinary, are in reality little different from criminal punishments.'¹³⁴ The sentences of aggravated arrest and confinement to barracks are classic examples. They have both

¹²⁷ *Ibid* 13, 15.

¹²⁸ *Ibid*.

¹²⁹ *Engel v The Netherlands* (note 111 above) para 1. Equally, the European Commission of Human Rights found that 'aggravated arrest' could not be justified by reference to normal conditions of army life.

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

¹³² *Ibid*. However, despite his findings above, Judge Vilhjálmsson did not find a breach of Art 5 of the Convention because of his interpretation of the article in question and the fact that one of the parties had served aggravated arrest after a decision by the Supreme Military Court of the Netherlands.

¹³³ Stavros (note 126 above) 13.

¹³⁴ Rowe (note 21 above) 74.

disciplinary and punitive elements, which in turn attract the application of relevant human rights standards.

I have argued that a person appearing before the CODH qualifies as an accused person for purposes of s 35(3)(c) of the Constitution.¹³⁵ In fact, both the Military Discipline Act and the Rules of Procedure refer to a person appearing before the CODH as an ‘accused person’. It is proposed, therefore, that the inevitable conclusion is that the CODH limits the right of an accused ‘to a public trial before an ordinary court’ provided for in s 35(3)(c) because the CODH is not a court of law and yet it has the power to impose a sentence which constitutes a criminal punishment or which is analogous to a criminal punishment. At best, the CODH can be classified as a tribunal or a disciplinary hearing which is analogous to a criminal process.¹³⁶

Section 36 of the Bill of Rights provides that the rights in the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on certain factors.¹³⁷ In this respect, the South African Constitution differs from many other bills of rights and international human rights instruments.¹³⁸ The analysis ‘involves the weighing up of competing values, and ultimately an assessment based on proportionality...which calls

¹³⁵ Unsurprisingly, Nel (note 21 above) 254 comes to a different conclusion: that an accused person before the CODH cannot be considered to be an accused person for purposes of s 35(3) of the Constitution and therefore the rights in that provision are not applicable.

¹³⁶ See Stavros (note 126 above) 9. Compare Nel’s suggestion (note 21 above) 237, 255 that the CODH should be regarded as a ‘court *sui generis*’.

¹³⁷ The full section is as follows: ‘The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.’ The Canadian Charter of Rights and Freedoms represents the primary model for the South African Bill of Rights.

The European Convention of Human Rights does not have a general limitation clause but certain rights have internal qualifiers. This means that an infringement of a right which does not have an internal qualifier such as Art 6 cannot be justified under the Convention.

¹³⁸ Ian Currie & Johan de Waal (eds.) *The Bill of Rights Handbook* (2005) 165. These include the United States Constitution and the European Convention on Human Rights. The European Convention of Human Rights does not have a general limitation clause but certain rights have internal qualifiers. This means that an infringement of a right which does not have an internal qualifier such as Art 6 cannot be justified under the Convention.

for the balancing of different interests.¹³⁹ It is to the limitation analysis that attention will now turn.¹⁴⁰

A s 36 enquiry involves two stages.¹⁴¹ The first question is whether a right in the Bill of Rights has been infringed or limited by law or conduct of the respondent, which is essentially a matter of interpretation of the right in question as already attempted above. The second stage, the justification enquiry, often involves an assessment of factual evidence. The minimum requirement for a limitation is that the law in question must be a law of general application in the sense that it must be sufficiently clear, accessible and precise¹⁴²—and also that it must equally apply to all people similarly situated and must not be arbitrary in its application.¹⁴³

There is no doubt that the Military Discipline Act is law of general application and therefore easily qualifies for purposes of s 36(1) of the Bill of Rights. The second question is whether the limitation of the right can be justified—whether or not the second stage will be reached will depend on the positive answer to the first question. A positive answer has already been established to the first question and the next step is to consider the second question—whether the limitation of the right in s 35(3)(c) can be justified. The onus of proving that the limitation is justifiable rests on the person relying on the limitation (usually the state).

The second stage of the analysis is usually referred to as the proportionality test which focuses on whether the law in question is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors listed in s 36(1)(a)-(e). The following paragraph in *S v Makwanyane*

¹³⁹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 104.

¹⁴⁰ In this section I draw heavily from the comprehensive and incisive work of Currie & de Waal (note 136 above) pp 164-188 regarding the general analysis of the limitation clause. Their work is based on the jurisprudence of the Constitutional Court of South Africa.

¹⁴¹ *Ibid.*

¹⁴² *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47.

¹⁴³ See Currie & Johan de Waal (note 138 above) in this regard.

*and Another*¹⁴⁴ has become a standard point of reference when the Constitutional Court considers the justifiability of the limitation:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality...The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'.¹⁴⁵ (footnotes omitted)

What follows is an analysis of each of the factors involved in the proportionality enquiry in the light of the paragraph quoted above. The starting point is s 36(1)(a) dealing with the nature of the right limited by the law in question—the right to a public trial before an ordinary court which is part of the right to a fair trial. Although this is a procedural right, it is clearly important in ensuring that the interests of the accused are protected, and also crucial in making sure that people have confidence in the justice system. Moreover, courts are better placed to ensure fairness and curb abuse of authority.¹⁴⁶

As for the importance of the purpose of the limitation, reasonableness requires the limitation of a right to serve some purpose, and justifiability requires that purpose to be worthwhile and important in a constitutional democracy.¹⁴⁷ It is common cause that the purpose of using disciplinary hearings is to ensure a swift enforcement of military discipline under all

¹⁴⁴ Note 139 above.

¹⁴⁵ *Ibid* para 104. Although the Court was referring to the limitation clause in the Interim Constitution, its views apply with equal force to the interpretation of s 36 because this provision is substantially similar to the limitation clause in the Interim Constitution.

¹⁴⁶ See *De Lange v Smuts* (note 114 above) para 63 where the Constitutional Court expressed similar sentiments.

¹⁴⁷ Currie & de Waal (note 138 above) 179.

circumstances as already discussed. The importance of the maintenance of military discipline, which is also a constitutional imperative as highlighted in s 200(1), cannot be gainsaid. Kriegler J puts it well in *Potsane*, that military discipline ‘is about having an effective force capable and ready to protect the territorial integrity of the country and the freedom of its people.’¹⁴⁸ The level of discipline of any military force can mean life or death for a particular country and its people, and sometimes impacts on the international community as well. It is the ‘primary object of the defence force to defend and protect the Republic, its territorial integrity and its people...’¹⁴⁹ Only a disciplined force can do so effectively. All this means that the importance of the purpose of the limitation cannot be questioned in a constitutional democracy.

Let us now consider the nature and extent of the limitation.¹⁵⁰ What is required is an assessment of the way in which the limitation affects the rights concerned.¹⁵¹ The question that is usually asked is whether the limitation is a serious or relatively minor infringement of the right.¹⁵² On the face of it, the infringement of the right in the present case is serious because instead of being tried by a court, an accused is tried by another forum which is not a court—his commanding officer or his nominee, and a member of the executive branch of the military (the military command).

However, there are a number of factors which seem to compensate for the extent of the infringement. These relate to the irreparability of the infringement of a right. This aspect was considered by the Constitutional Court in *S v Makwanyane* in relation to the death penalty and weighed heavily in the court’s conclusion.¹⁵³ The first factor is that the damage that may be caused as a result of trial by the CODH is reparable because ‘every finding of guilty, any sentence imposed and every order made by a military

¹⁴⁸ Note 103 above, para 38.

¹⁴⁹ Section 200(2) of the Constitution.

¹⁵⁰ Section 36(1)(c) of the Constitution.

¹⁵¹ Currie & de Waal (note 138 above) 181.

¹⁵² *Ibid.*

¹⁵³ See in particular para 146.

court shall be subject to the process of review.¹⁵⁴ This process happens automatically. The only flaw with the automatic review process is that it is not conducted by a court of law as discussed in Chapter Two. However, in terms of s 34(5) of the Military Discipline Act '[a]n offender may within the time limits and in the manner prescribed in a rule of the Code, apply for the review of the proceedings of his or her case by a Court of Military Appeals.' This arguably compensates for the flaw with regard to the automatic review process in this context.

Another point which could be considered is the fact that an accused is tried before the CODH as a matter of choice. In other words, the accused has the right to elect to be tried by a military court instead of the CODH. This means that the accused can be understood to have validly waived certain rights.¹⁵⁵ Viewed cumulatively, all these factors suggest that the nature and the extent of the infringement are not that serious because there are checks and balances built into the system.¹⁵⁶ Be that as it may, let us, nevertheless, run the enquiry to its conclusion for completeness' sake.

The next factor to consider is the relation between the limitation and its purpose.¹⁵⁷ This requires that the law must serve the purpose that it is designed to serve.¹⁵⁸ A law which does not do this or which only marginally contributes to achieving its purpose cannot be an acceptable justification for a limitation of a right. A disciplinary hearing by a commanding officer significantly contributes to a swift maintenance of discipline. The reason for this is that commanders are always on the spot at which transgressions occur, and are best placed to take swift action which follows a relatively

¹⁵⁴ Section 34(1) of the Military Discipline Act.

¹⁵⁵ In a dissenting opinion in *Bell v The United Kingdom* (note 65 above) Maruste J arrived at a similar conclusion regarding the British summary trial system which provided the accused with an option to be tried by a court martial instead of the summary trial. Maruste J took the view that, in those circumstances, an accused who chooses to be tried by a summary trial validly waives applicable rights. However, the majority found that the waiver was not valid because, for the accused, the election essentially entails choosing between his commander and a military court.

¹⁵⁶ Commenting on summary trials of the United Kingdom, Rowe (note 110 above) 214-215 appears to favourably consider similar safeguards in relation to how a summary trial by a commanding officer should be viewed.

¹⁵⁷ Section 36(1)(d) of the Constitution.

¹⁵⁸ Currie & de Waal (note 138 above) 183.

simple procedure as they are in control of all relevant military personnel. They can easily enforce discipline, more visibly and effectively than any other authority. They are the central pillar of military discipline.

This brings me to the last factor—whether less restrictive means exist to achieve the same purpose.¹⁵⁹ A legitimate limitation must achieve benefits which are proportionate to the costs of the limitation.¹⁶⁰ If other means could be used to achieve the same result that will either not restrict the rights at all, or will not restrict them to the same extent, the limitation will not be proportionate.¹⁶¹ However, the alternative method must be equally effective, and a margin of appreciation is given to the state in assessing the effectiveness of the alternative method because it is not the role of the courts to second guess the wisdom of policy choices made by the legislature.¹⁶² Most limitation arguments stand or fall on whether or not less restrictive means exist to achieve the same purpose.¹⁶³

In the present case, the potentially less restrictive means for swift maintenance of discipline would be to make use only of fully fledged military courts which are already in place. However, it is questionable whether military courts can achieve swift military discipline in the manner that commanding officers do in the light of their special position within the military establishment. The main problem with this option is that courts are generally associated with delays in finalising cases. It is common cause that this is generally a universal phenomenon. This has been captured well by Wade and Forsyth when they state that '[t]he process of the courts of law is elaborate, slow and costly'¹⁶⁴ in comparison with administrative tribunals which generally follow a relatively simple procedure. Delays in court

¹⁵⁹ Section 36(1)(e) of the Constitution.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid* 184.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ Cited with approval in *Sidumo and Another v Rustenburg Platinum Mine Ltd and Others* (2) SA 24 (CC) para 125. This case dealt, among other things, with the question whether PAJA applied to the Commission for Conciliation, Mediation and Arbitration (CCMA). The Court held, by a majority, that although the just administrative clause applied to the CCMA, PAJA did not apply to the CCMA mainly because of the principle that 'general legislation, unless specifically indicated does not derogate from special legislation.' PAJA is the general legislation while the LRA is the special legislation.

processes cannot be attributed to a single factor, but to a combination of factors whose influence will vary according to the circumstances of each case. That said, factors that are commonly associated with delays in military court proceedings are highlighted below.¹⁶⁵

The lack of availability of witnesses and sometimes even that of accused persons is arguably the most common factor. Military court officials have to arrange for witnesses and accused persons to appear before courts because an overwhelming majority of military units do not have military courts on site. The process of arranging for witnesses and for the accused to appear does not always go smoothly due to many factors which need not be dealt with here;—suffice to say that sometimes the reasons could be operational or administrative. For example, military units sometimes go on deployment at sea or some other remote places. This would affect the expeditious conclusion of cases because some key witnesses may be part of the deployment. Furthermore, when military units are on the move or at sea, they do not always travel with military court personnel for many reasons. One of the reasons is sustainability, given the magnitude of operational deployments at times. In addition, if each and every transgression were to be dealt with by a court, military units would be operationally weakened because many military personnel will spend too much time moving back and forth attending court cases. That would affect military capacity and the effectiveness of the defence force.

Another related point is that court rolls are usually clogged, and in some instances, military courts cannot go through all the cases set down for trial in a particular court session. The situation is likely to be made worse if commanders are to be stripped of their disciplinary powers. This means that if commanders were to rely solely on military courts for military discipline, swift maintenance of military discipline would not be guaranteed, and this would have disastrous consequences for discipline, and be in contravention of the Constitution which requires the defence force to be structured and

¹⁶⁵ The factors highlighted here refer to South Africa but it is likely that they could be of general application as military organizations the world over share common attributes.

managed as a disciplined military force. Another factor which causes delays in court proceedings is the manner in which lawyers conduct themselves in litigation, which could be informed by many factors. Some of the tactics employed by lawyers can be unnecessarily time-consuming. Delays can also be caused by the lack of availability or shortage of court personnel.

It could be argued that the challenges highlighted above can be addressed with proper planning, management and the hiring of a far greater number of judges and court personnel to fill the gap that may be left by the disbandment of the CODH. In my view, it is unrealistic to expect that the government would direct more resources towards this effort, given the challenges this country faces regarding its civilian criminal justice system which deals with a far greater number of people—let alone the socio-economic situation in the country arising from the legacy of apartheid.

Another reason against the alternative option is that it is not good military policy for commanders to lose direct control of the formal disciplinary structures of the military completely, because they bear final responsibility for the enforcement of discipline in any military force. Commanders have (for good reasons) lost direct control of military courts—the CODH is the only remaining formal weapon for them to have a direct say in the enforcement of discipline of those under their command. As James points out and as is quoted with approval by the Constitutional Court in *Potsane*: '[i]t is the responsibility of those who command to instil discipline in those who they command.'¹⁶⁶ Similarly, Griggs says that '[a]s a consequence of the need for officers to directly maintain discipline in their commands, disciplinary offences are heard by those officers rather than courts.'¹⁶⁷ All these are consistent with the principle of command empowerment and the need for expeditious maintenance of military discipline.¹⁶⁸

¹⁶⁶ Note 103 above para 38.

¹⁶⁷ Note 74 above 69.

¹⁶⁸ *Ibid* 79.

I propose that a strong conclusion can be drawn from the above analysis which is that there are no less restrictive means to ensure the swift maintenance of discipline for minor transgressions than using the CODH. In the circumstances, it can be concluded that the harm caused by the law which creates the CODH is proportionate to the purpose sought to be achieved, and I therefore argue that the limitation is reasonable and justifiable in terms of s 36 of the Bill of Rights.

I will now briefly consider the possible application of s 34 of the Bill of Rights, 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' This provision does not apply to criminal proceedings because these are not ordinarily referred to as 'disputes'.¹⁶⁹ Furthermore, criminal proceedings are specifically regulated in s 35 of the Bill of Rights as we have already noted. That disposes of the possible application of s 34 to the proceedings of the CODH. However, it should be pointed out that the High Court in *Freedom of Expression Institute and Others v President of the Ordinary Court Martial NO and Others*¹⁷⁰ wrongly assumed (without analysis) that s 34 applied to military courts despite the fact that there were Constitutional Court authorities which suggest otherwise.¹⁷¹ The High Court applied both s 35(3)(c) and s 34 to the issues raised in that case instead of just focusing on s 35(3)(c). The approach in that Court in relation to the application of s 34 does not disturb the conclusion reached because, it is, with respect, wrong.

Finally, it might be worth considering the possible application of the just administrative action clause¹⁷² to the CODH, together with the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which has been

¹⁶⁹ *S v Pennington* 1997 SA 1076 (CC) para 46. See also *De Lange v Smuts* (note 114 above) para 65 in support of this view. The Court stated that s 34 governs 'other legal proceedings'. Compare the view by Nel (note 21 above) 238-239 that s 34 of the Constitution constitutes appropriate testing criteria for the CODH.

¹⁷⁰ Note 20 above.

¹⁷¹ For example, *De Lange v Smuts* (note 114 above) which the High Court ironically considered in its judgment.

¹⁷² Section 33 of the Constitution.

enacted to give effect to the just administrative clause. Section 33 of the Constitution provides as follows:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must—
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

In my view, the argument for the possible application of the just administrative action clause quoted above falls at the first hurdle for the reasons similar to those advanced with respect to the possible application of s 34 of the Constitution. Chief among these is that the CODH is analogous to a criminal process which necessitates the application of s 35. This means that it would be unnecessary to apply the just administrative action clause to the CODH because a purposive approach would require that all criminal process or analogous proceedings be dealt with under s 35. Recently, the Constitutional Court affirmed the principle that ‘the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law.’¹⁷³ Furthermore, the Court stated that ‘[o]nce a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system.’¹⁷⁴ Section 35 of the Constitution, read with the Military Discipline Act, creates rules and structures to deal with the criminal process and analogous matters within the military. The CODH should therefore be dealt with in accordance with

¹⁷³ *Gcaba v Minister of Safety and Security and Others* 2010 (1) SA 238 para 56. This case was an application for leave to appeal against a judgment of the Eastern Cape High Court. One of the key issues that had to be determined was whether failure by the State to appoint the applicant to a particular position which he applied for amounted to an administrative action triggering the application of s 33 of the Constitution. The Court answered the question in the negative mainly because s 33 does not regulate the relationship between the State as employer and its workers. It stated that the remedy for the applicant lied in the structures created within the Labour Relations Act 66 of 1995.

¹⁷⁴ *Ibid.*

those rules and mechanisms. Of course, rigid compartmentalisation in a system such as ours should be avoided because human rights are interdependent, indivisible and inseparable.¹⁷⁵ However, by way of emphasis, there are good policy reasons for preferring specialist rules, such as ensuring certainty, avoiding duplication and festering of a dual system of law.¹⁷⁶

That said, there may still be those who persist in arguing that the CODH is an administrative tribunal which should be regulated in terms of s 33 of the Constitution. I would counter that the powers exercised by the CODH cannot be regarded as administrative for purposes of the just administrative action clause. In *Chirwa v Transnet Ltd and Others*, it was held that as to whether conduct constitutes administrative action is not dependent on the position which the functionary occupies 'but rather on the nature of the power being exercised.'¹⁷⁷ In the context of this discussion, it means that we should not focus on the fact that the power is being exercised by an official who is part of the chain of command of the military (the commanding officer). The power to sentence an individual to confinement to barracks for a period of 21 days in the manner described above is analogous to detention and cannot be regarded as an administrative function. As already discussed, the CODH exercises this type of power, among others. This is not the kind of power that can be exercised administratively. In *De Lange v Smuts* it was held that the power to commit a person to prison did not involve administrative action.¹⁷⁸ As stated above, confinement to barracks is analogous to committal to detention which falls within the realm of imprisonment for purposes of deprivation of liberty. In line with *De Lange v Smuts* this power does not involve an administrative action but can only be described as judicial in character. Even if the CODH constituted an administrative tribunal for purposes of s 33, PAJA would still not apply because general legislation does not derogate from special legislation, unless

¹⁷⁵ *Ibid* paras 53-54.

¹⁷⁶ These reasons were generally referred to by the Constitutional Court in its reasoning *ibid*.

¹⁷⁷ 2008 (4) SA 367 (CC) para 72.

¹⁷⁸ Note 114 above.

specifically indicated.¹⁷⁹ In this context, PAJA is the general legislation while the Military Discipline Act is the special legislation. This means that the question would be whether the relevant provisions of the Military Discipline Act (together with the rules) are constitutionally compliant with the just administrative action clause. No further attempt will be made at answering that question any in the light of the conclusions already reached regarding the applicability of s 33 to the CODH.

Given its powers and organization, the CODH is *more like* a court of law on a sliding scale than an administrative tribunal of a disciplinary nature which functions in the context of an employment relationship. In addition, it might be worth pointing out that in *Gcaba v Minister of Safety and Security and Others* the Constitutional Court held that s 33 does not regulate the relationship between the State as employer and its workers. Although proceedings before the CODH assume a criminal character, it does not change the fact that this happens in the context of an employment relationship, albeit of an unusual type as acknowledged in *South African National Defence Union v Minister of Defence and Another*.¹⁸⁰

The difficulty of finding the right place for the CODH is not surprising given the uniqueness of the military discussed in Chapter Two.

Interestingly, not even the Labour Relations Act (LRA) 66 of 1995 applies to the Defence Force despite the fact that some constitutional labour relations rights have been found to apply to the Defence Force by the Constitutional Court. The Act is expressly excluded from application to the Defence Force, among others.¹⁸¹ This, again, signifies the unique position of the defence force in society. The effective and fair running of the military

¹⁷⁹ This long standing principle was applied by the Constitutional Court in *Sidumo v Rustenburg Platinum Mine Ltd* (note 164 above). This case dealt, among other things, with the question whether Promotion of Administrative Justice Act 3 2000 (PAJA) applied to the Commission for Conciliation, Mediation and Arbitration (CCMA) created by the Labour Relations Act 66 1995. The Court held, by a majority, that although the just administrative clause applied to the CCMA, PAJA did not apply to the CCMA mainly because of the principle that the 'general legislation, unless specifically indicated does not derogate from special legislation.'

¹⁸⁰ 1999 (6) BCLR 615 (CC) para 27.

¹⁸¹ Section 2 of the LRA. It also does not apply to the National Intelligence Agency.

justice system simply requires the application of the right to a fair trial (s 35). Elements of that right may be limited in terms of the limitation clause and the CODH represents an example of that. What all this means is that the framework that applies to the CODH consists of the right to a fair trial and the relevant defence legislation i.e. the Defence Act and the Military Discipline Act.

However, my proposals regarding the defensibility of the CODH as currently constituted do not necessarily suggest that it cannot be improved in order to ensure that it becomes fairer. Far from it, much can be done to make certain that the accused before the CODH is adequately assisted but this is not the place for that topic. Furthermore, there could also be greater emphasis on the impartiality of commanders and improvement of their training.¹⁸²

3.5 Concluding remarks

This Chapter has attempted to consider the status of the Commanding Officer's Disciplinary Hearing within the South African military court system. Specifically, its aim was to show that this forum is not a court of law, and was not meant to be a court of law. In the process of argument, it considered the possible application of a number of rights to the CODH. These include certain aspects of the right to a fair trial; the right to be heard by an independent court or, where appropriate, another independent and impartial tribunal and forum; and the just administrative action clause. The chapter also drew some lessons from comparative military justice in relation to the status of the said forum.

¹⁸² The study conducted by Rowe (note 110 above) 205-206 in respect of the workings of the United Kingdom's Summary Appeal Court shows that a lot can be done to improve the fairness and training of commanders regarding their role in summary trials. The study shows that between October 2000 to September 2002, only 14 per cent of commanding officer's decisions were upheld by the Summary Court. Many of the reasons proffered for this phenomenon suggest that there is a need to improve the process of summary trials and the training of commanding officers. Although the study only looked at the United Kingdom, it could prove to be instructive to other jurisdictions as well.

The major findings of this Chapter can be summarised as follows:

- Although the CODH is more like a court of law on a sliding scale than an administrative tribunal, it is not a court of law because it does not have some of the key attributes of what constitutes a court. Its character and stature are in line with similar forums in selected open and democratic societies, some of which have recently reformed their military justice systems. At best it could be identified as a unique disciplinary tribunal.
- There are difficulties in identifying the actual status of the CODH. The difficulty is not surprising given the uniqueness of the military. The CODH sits between an administrative tribunal of a disciplinary nature and a court of law.
- The Constitution sanctions the CODH to function not as a court of law because the utilisation of this forum is permitted by it and constitutes a reasonable and justifiable limitation of an accused's right to a public trial before an ordinary court. A fundamental shift in character and composition of the CODH will most likely compromise the operational effectiveness of the armed forces, which the Constitution requires to be structured and managed as a disciplined military force.

The result of the conclusions reached is that the CODH cannot be expected to comply with the requirements of judicial independence as provided for in s 165 of the Constitution since those only apply to courts of law or tribunals envisaged in s 34 of the Constitution. It is on this basis that an assessment of judicial independence of military courts in Chapter Six will not include the CODH.

Having attempted to clarify the status of the CODH, the next chapter focuses on the history and the meaning of the notion of judicial independence.

CHAPTER 4

THE MEANING OF JUDICIAL INDEPENDENCE

4.1 Introductory remarks

Judicial independence is one of the fundamental principles in most democratic societies. In Chapter Two, it was established that military courts are courts of law and part of the judicial system of the Republic South Africa with the result that the principle of judicial independence applies to these courts. Both the Constitution and international instruments do not define judicial independence. They simply declare and require that courts must be independent without explaining what it means to be independent and how such independence must be secured. The aim of this chapter is, therefore, to assess the meaning of judicial independence with a particular focus on the South African Constitution but also drawing from international principles where appropriate. The chapter will be used as the theoretical framework for assessing the judicial independence of military courts in Chapter Six.

4.2 Historical background to the notion of judicial independence

The principle of judicial independence derives from the doctrine of the separation of powers.¹ The principle of the separation of powers primarily requires that there should be separation between the three spheres of the state: namely the executive, the legislature and the

¹ International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors A Practitioners' Guide* (2004), online: <<http://www.icj.org/IMG/pdf/Guide.pdf>> [accessed on 30 June 2005]. See also C Okpaluba 'Institutional independence and the constitutionality of legislation establishing lower courts and tribunals: Part I' (2003) 28 (2) *Journal for Juridical Science* 109, 120-125 for a further discussion.

judiciary. The English political philosopher (Locke: 1632-1704), is generally seen by some authors as a major writer on the separation of powers doctrine.² He considered the following three powers of the Commonwealth: the legislative, the executive and the federative power.³ Locke said very little about judicial power.⁴ It would appear that he regarded the judicial branch as part of the executive given that his ideas concerning the implementation of the laws include their application to particular individual cases.⁵ However, he understood the need for a judicial branch to judge the controversies between subjects and Princes.⁶ He also understood that the judge must be impartial and independent.⁷

The above-mentioned philosopher discussed the administration of justice in *Fundamental Constitutions of Carolina* (1669).⁸ He contemplated a system of justice in the hands of judges and juries although he did not specifically refer to the separation of judicial from the other powers as noted above.⁹ His thinking does suggest a separation of judicial power from other powers but it appears that he did not give much substance to this suggestion. Although Locke's work is generally seen as historically important, it has had little impact on contemporary judicial thinking compared to one of Locke's successors.¹⁰

The key successor to Locke is the French writer Charles-Louis de Secondat Montesquieu (1689-1755). He is most often referred to as

² See David Clark (ed.) *Principles of Australian Public Law* (2007) 87.

³ In Clark, *Ibid.*

⁴ *Ibid* 88.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Clark *ibid*, quoting Mark Goldie (ed.) *Locke, Political Essays* 1997, 160-181 Arts 55-64 (at 172-4).

⁹ Clark (note 2 above) 88.

¹⁰ *Ibid.*

the principal writer on separation of powers.¹¹ In his most famous book, *The Spirit of the Laws*, Montesquieu discussed the concept of diffused power among the organs of the state and he divides them as follows: legislative power; executive power over things depending upon the right of nations; and executive powers over things depending on civil right.¹² Although Montesquieu does not mention judicial power, his second kind of power can be seen to be judicial in nature.¹³ In explaining this power, he stated that '[t]he last will be called the power of judging...'¹⁴ He observed further that there is no 'liberty if the power of judging is not separate from legislative power and from executive power.'¹⁵ According to him, '[t]ribunals of the judiciary must...be coolheaded and, in a way, neutral in all matters of business.'¹⁶ According to Clark, Montesquieu treatment of separation of powers was distinctive¹⁷ but not original. Nevertheless, his philosophy was widely received in the 18th century.¹⁸

4.3 Judicial independence in liberal democratic theory¹⁹

It has to be stated from the outset that there is no general theory of judicial independence in the world of liberal democracy.²⁰

¹¹ *Ibid* 89. Others even regard him as 'the father of the doctrine of the separation of powers' (see, for instance, Dion Basson & Henning Viljoen (ed.) *South African Constitutional Law* (1988) 23.

¹² Many of the following sentences are based on the translation of M Cohler *et al* (trans and eds.), Montesquieu *The Spirit of the Laws* 1989 as cited in Clark *ibid*.

¹³ Clark *ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid* 90. Evidence shows that he was familiar with the work of Locke. See Robert Shackleton *Montesquieu: A Critical Biography* 1961 298-301 in this regard.

¹⁸ *Ibid* 90-91. For another brief description of his work on the doctrine of the separation of powers, see Basson & Viljoen (note 11 above) 23-25.

¹⁹ South Africa is generally regarded as a liberal democracy and perhaps its founding provisions, a sophisticated Bill of Rights and constitutional structures supporting democracy (so called Chapter Eight Institutions) are a clear testament of the correctness of this characterisation. It is mainly for this reason that an introduction to the notion of judicial independence in liberal democratic theory is considered here to provide some general context to the discussion of the widely recognised concept of judicial independence.

This is despite the fact that judicial independence is generally viewed as an essential feature of liberal democracy.²¹ In political science, the concept of judicial independence is about connections or absence of connections between the judiciary and other components of the political system.²² The treatment of judicial independence by different liberal democracies is not the same.²³ There are tremendous differences in the arrangements which liberal countries put in place to secure the various components of judicial independence.²⁴ These differences have led Russell to even ask the question whether there is any basis for comparative analysis in this field or the concept is so fundamentally variable that there is really no basis for comparative analysis. However, he believes that ‘it must be possible to arrive at an understanding that makes comparative study of judicial independence possible.’²⁵ I might add that it seems what brings most liberal democracies closer on the issue of judicial independence are international standards (discussed in Chapter Five) and comparative analysis.

A general discussion on the rationale and meaning of judicial independence follows.

The meaning and rationale of judicial independence

Judicial independence has been used (in political science) to refer to the concepts of collective and individual autonomy of judges

²⁰ See Peter H. Russell ‘Toward a General Theory of Judicial Independence’ in Peter H. Russell & David M. O’Brien (ed.) *Judicial Independence in the Age of Democracy* (2001) 1. See also Kate Malleson ‘Judicial Training and Performance Appraisal: The Problem of Judicial Independence’ (1997) Vol. 60 *Modern Law Review* 657, stating that there is no universally agreed definition of the principle of judicial independence.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid* 2-3.

²⁵ *Ibid.*

from other individuals and institutions.²⁶ In the context of dimensions of judicial independence, this is the most widely recognized dimension – with its focus on the external forces. The second dimension refers to sources of influence and control within the judiciary itself. In the former dimension, it is the independence of the judiciary as a collective or an institution whose independence is at stake whereas in the latter dimension it is the independence of the individual judicial officer which is at stake.²⁷

Judicial independence is also used to refer to judicial decision making that is considered indicative of judges enjoying a high measure of autonomy.²⁸ According to Russell, judges who frequently hand down decisions against the government ‘may well enjoy a high degree of independence from that government but might be very susceptible to control by nongovernmental forces.’ He gives examples of judges who rule against state prosecutors because they are being bank-rolled by organized crime, or who overturn government policy because they are closely aligned with the opposition interest group, or that they may be dependent on the media as is the case with Italian magistrates.²⁹ All these suggest that when one talks of judicial independence, the focus should not exclusively be on the independence from the government as there are other role players as well; but the government is undoubtedly the key player and, it is, therefore, not surprising that the main focus is on it. It will be no different in this study.

The two senses of the concept of judicial independence are considered to be closely related and one is generally seen as a means to another although this is not always the case.³⁰ A high measure of

²⁶ *Ibid* 6.

²⁷ See *ibid* 11-12 for a brief discussion of these two dimensions of judicial independence.

²⁸ *Ibid*.

²⁹ See *ibid* 8 in this regard.

³⁰ *Ibid*.

autonomy does not necessarily guarantee that judges will think and act in an independent manner. Although institutional arrangements considered to be conducive to an independent-minded judiciary can be established and maintained, judicial independence of mind and behaviour cannot be manufactured.³¹ Furthermore, Russell also points out that an absence of crucial aspects of autonomy does not always translate into judges not acting independently as some judges may defy the odds and act independently.³²

Another word which should be defined in this debate is the meaning of 'judicial' or 'judiciary'. According to Shimon Shetreet the judiciary could be defined as 'the organ of government not forming part of the executive and the legislature, which is not subject to personal, substantive and collective controls, and which performs the primary function of adjudication.'³³ It is evident that the CODH hardly fits into this definition for the reasons discussed in Chapter Three.

What is the rationale for judicial independence? Russell deals with this question and explains it beautifully as follows: ³⁴

We want judges to enjoy a high degree of autonomy so that, when disputes arise about our legal rights and duties to one another and in relation to public authorities...we can submit them for resolution to judges whose...independence gives us reason to believe they will resolve the issues fairly, according to their understanding of the law, and not out of fear of recrimination or hope of reward.

³¹ *Ibid* 7.

³² *Ibid* 7-8.

³³ S Shetreet and J Deschenes (ed.) *Judicial Independence: the contemporary debate* (1985), 597-598. Shetreet arrived at this definition after surveying judicial independence of 29 countries. This approach is informed by the concern that judicial independence is sometimes undermined by transfer of judicial functions from an autonomous judiciary to officials and agencies that have very little independence (Russel (note 20 above) 8). South Africa adopts an interesting position on the characterization of courts or the judiciary in its Constitution. A court or judicial officer does not constitute an organ of state (s 239). However, Russel takes a pragmatic or functional approach as opposed to the formal approach adopted by Shetreet above. In his view, the judiciary are the officials and institutions that perform the central function of adjudication.

³⁴ Russell (note 20 above) 10.

It is clear from the above quotation that people want the judiciary to be independent because the fair resolution of disputes is important to them. A fair adjudication of disputes can hardly take place if judicial officers are susceptible to external influences or pressure. That said, full judicial autonomy or independence cannot be realized.³⁵ This is mainly for the following reasons: (i) because judges make the law in the process of rendering authoritative judgments, they are part of the system of governance and are therefore state functionaries; (ii) judicial institutions are established, protected and maintained by other arms of the state and this means that their autonomy from other arms of the state can only be partial; (iii) judicial officers take office with predispositions based on their pre-judicial experience and affiliations and these are not easily shed even if they are challenged by new orientations after taking judicial office.³⁶

However, none of the above justifies abandoning the ideal of judicial independence given that a sound principle of government should not be discarded on the basis that it cannot be fully realized.³⁷ In my view, this suggests that judicial independence is more of an ideal than a principle which can be achieved fully. With this reality in mind, how then, should one approach judicial independence? From the eye of a political scientist, Russell suggests figuring out ‘what kinds of independence it is most essential to maintain.’³⁸ He suggests four critical points of control and undue influence. They are as follows: structural—which refers to the power of government bodies outside the judiciary to create and modify judicial institutions; personnel—these include the methods of appointing, remunerating,

³⁵ Indeed, Russell’s comparative study of 12 commonwealth countries from different legal traditions, concludes that ‘judicial independence is never a condition that is established fully or that is enjoyed without controversy or challenge’ (*ibid* 301).

³⁶ *Ibid.*

³⁷ *Ibid* 11.

³⁸ *Ibid.* Russell speaks of focusing on the points where the absence of independence is most telling and destructive of the institution’s claim to legitimacy. He argues that judicial independence is at risk if influences undermine the judicial officer’s capacity to adjudicate. That is if the judge faces the risk of not being accepted as a common judge by the disputing parties (*ibid* 12).

and disciplining judges; court administration; and finally, direct approaches.³⁹ In legal terms, the equivalent of Russell's approach would be ascertaining the basic requirements of or essential conditions for judicial independence.

Judicial independence can be protected through various institutional arrangements. A constitutional guarantee is often looked to as the most effective way of protecting judicial independence.⁴⁰ However, the challenge of constitutional guarantees is their interpretation and enforcement by the judiciary due to the fact that such an exercise effectively requires judges to act as judges in their own case.⁴¹ On this basis, and given the complex and multifaceted nature of the principle of judicial independence, Russell argues that judges should not be given the last word in working out the practical meaning of the concept.⁴²

This is an interesting view point. However, Russell does not tell us who should have the last word on the issue. Entrusting the last word to the legislature, for example, could pose a real threat to judicial independence. This is a difficult issue which requires some kind of compromise on both ends—perhaps in the form of a dialogue between the three key branches of state, that is the executive, the judiciary and the legislature. However, managing such a dialogue can prove to be difficult. Recently, South Africa has been battling with this issue, which arose in the context of the proposed package of Judicial Bills aimed at regulating a number of aspects on the judiciary.⁴³

³⁹ See *ibid* 13-22 for an insightful discussion of the above critical points of control and undue influence. Although these points largely emanate from political thought, they are persuasive, practical and also have resonance in legal thinking.

⁴⁰ *Ibid* 22.

⁴¹ *Ibid* 23.

⁴² *Ibid*.

⁴³ See Democratic Rights and Governance Unit (ed.) *The Judicial Institution in Southern Africa* (2006) (153-155), for a brief account of the resulting tensions between the executive and the legislature on the one hand and the judiciary on the other.

In any event, the point which Russell raises is moot in the context of South Africa because the Constitution entrusts the courts with the last word on the meaning of judicial independence.⁴⁴ This brings me to the discussion of the South African Constitutional Court's approach to matters of separation of powers and judicial independence.

4.4 Separation of powers and judicial independence under the South African Constitution

The separation of powers was central in the making of South Africa's democratic Constitution. It was one of the 34 Constitutional Principles with which the final Constitution had to comply.⁴⁵ The Constitutional Court certified the final Constitution in *Ex Parte Chairperson of the National Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (second certification case).⁴⁶

Principles VI and VII provided for the separation of powers and judicial independence respectively. Principle VI stated that '[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' On the other hand Principle VII provided that '[t]he judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.'

⁴⁴ However, it must be borne in mind that this, of course, does not preclude other institutions of state from participating in the debate as long as this is done within the constitutional framework.

⁴⁵ This was required in terms of s 71 of the Interim Constitution Act 200 of 1993. This section required that constitutional text passed by Constitutional Assembly in terms of chapter 5 of the Interim Constitution be certified by Constitutional Court as complying with Constitutional Principles set out in Schedule 4 of that Constitution.

⁴⁶ 1997 (2) SA 97 (CC).

In the *first certification judgment*,⁴⁷ the Constitutional Court made some remarks which are of general and particular interest with regard to its understanding of the separation of powers doctrine.⁴⁸ The Court observed that there was ‘no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.’⁴⁹ However, it is worth noting that in *De Lange v Smuts NO and Others* (*De Lange*), Ackermann J for the majority stated that ‘over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution....’.⁵⁰ The Court stated further that ‘no constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.’⁵¹ Separation of powers is not a fixed or rigid constitutional doctrine.⁵² CP VI did not prescribe what form of separation should be adopted in the Constitution. However, the principle of separation of powers ‘recognizes the functional independence of the branches of government.’⁵³

More importantly, the Court said that an independent judiciary is an essential part of the separation of powers.⁵⁴ The Constitution

⁴⁷ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC). In this case, the Court held that it was unable to certify that all the provisions of the adopted text complied with the constitutional principles in Schedule 4 and remitted the text to the Constitutional Assembly.

⁴⁸ The Court embarked on this exercise because some parties raised objections which bordered on the doctrine of separation of powers. See paras 106-107 of the *first certification judgment*.

⁴⁹ *Ibid* para 108.

⁵⁰ 1998 (3) SA 785 (CC) para 60. This case dealt with an application for confirmation of a High Court order declaring s 66(3) of the Insolvency Act, which authorises a person presiding over a creditors’ meeting to imprison a recalcitrant witness, unconstitutional. The Court confirmed the High Court’s order only to the extent that it held that s 66(3) is unconstitutional for authorising a presiding officer who is not a magistrate to commit a recalcitrant witness to prison.

⁵¹ *Ibid* para 109.

⁵² *Ibid* para 111.

⁵³ *Ibid*.

⁵⁴ *Ibid* para 123. It is worth noting that in *Van Rooyen and Others v The State and Others (General Council of the Bar South Africa Intervening)* 2002 (5) SA 246 (CC)

recognizes this. Judicial independence and other related matters are provided for in s 165 of the Constitution. It vests the judicial authority of the Republic in the courts and provides that '[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'⁵⁵ Organs of state have the responsibility to ensure the 'independence, impartiality, dignity, accessibility and effectiveness of the courts.'⁵⁶ This has to be done through legislative and other measures.⁵⁷ This suggests that there is a whole range of things that could be done to meet the objectives in s 165(4) of the Constitution.

Furthermore, s 165(3) provides that '[n]o person or organ of state may interfere with the functioning of the courts.'

While the Constitution declares all courts to be independent, it does not prescribe the exact measures which must be adopted by organs of state in order to assist and protect the courts aimed at ensuring their independence. It mainly provides for general guidelines which should shape the legislative and other measures to be adopted. This is particularly the case in relation to measures which must be adopted to protect and assist the lower courts.⁵⁸ The Constitution is clearer on some aspects of the nature of independence of superior courts and their judges. It provides for their appointment, terms of office and to some extent their remuneration.⁵⁹ It does not do so for

para 17, the Constitutional Court stated that '[j]udicial independence and impartiality are also implicit in the rule of law...' which is foundational to the Constitution (s 1(c)). This case primarily dealt with the independence of magistrates in South Africa. Judicial independence of magistrates was challenged on several grounds. The Constitutional Court upheld some of the challenges and dismissed others.

⁵⁵ Section 165(1)(2).

⁵⁶ Section 165(4).

⁵⁷ *Ibid.*

⁵⁸ For example, see s 174(7) in relation to the appointment of 'other judicial officers'. These 'must be appointed in terms of an Act of Parliament which must ensure that their appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.'

⁵⁹ See ss 174-178.

‘other judicial officers’. As already argued in Chapter Two, military judges can be regarded as ‘[o]ther judicial officers’ for the purposes of the Constitution as they are not, among other things, appointed through procedures involving the Judicial Service Commission.⁶⁰ All these factors mean that one has to look elsewhere for an answer on the meaning of judicial independence—particularly in relation to lower courts.

Globally, legal scholarship that has dominated the literature on judicial independence derives its ideas from the precedents and practices of particular legal traditions.⁶¹

Constitutional Court’s interpretation of judicial independence

The Constitutional Court has had the opportunity to consider the question of judicial independence on a few occasions. The first crucial case which pointed the direction of the Constitutional Court on its interpretation of judicial independence is *De Lange*.⁶² In this case, the Court mainly quoted, with approval, several passages from the leading Canadian case of *R v Valente* (*Valente*) on the essential conditions for judicial independence.⁶³ In the same case (*De Lange*), the Court also drew from the following cases *Canada v Beauregard*,⁶⁴ (*Beauregard*), *R v Généreux* (*Généreux*),⁶⁵ both also from the Canadian Supreme Court. The Constitutional Court found the views of the Canadian Supreme

⁶⁰ See Aifheli Enos Tshivhase ‘Military Courts in a Democratic South Africa: An Assessment of their Independence’ (2006) 6 *New Zealand Armed Forces law Review* 96, 105.

⁶¹ Russell (note 20 above) 11.

⁶² Note 50 above.

⁶³ (1985) 24 DLR (4th) 161 (SCC). This case primarily dealt with the question of whether or not the Provincial Court (Criminal Division) was independent within the meaning of s. 11(d) of the Canadian Charter of Rights and Freedoms.

⁶⁴ (1986) 30 DLR (4th) 481.

⁶⁵ (1992) 88 DLR (4th) 110. For an analysis of this judgment see, Michael Doi ‘The Judicial Independence of Canadian Forces General Court Martials: An Analysis of the Supreme Court of Canada Judgment in *Regina v. Genereux*’ (1993) 16 *Dahousie Law Journal* 234.

Court to be instructive in deciding what is meant by ‘an independent tribunal or forum’⁶⁶ for the purposes of s 34 of the Constitution which provides everyone’s right ‘to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

As a starting point the Court referred to the following views of the Canadian Supreme Court in *Canada v Beauregard* as a summary to the essence of judicial independence:⁶⁷

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

The above principle is entrenched in s 165(3) of the Constitution which provides that ‘[no] person or organ of state may interfere with the functioning of the courts’ read with s 165(1) which vests judicial authority of the Republic in the courts.⁶⁸

The Constitutional Court (relying on the Canadian Supreme Court) adopted the following as the essential conditions for judicial independence which could be applied independently and were capable of achievement by a variety of legislative schemes or formulas:

- Basic degree of financial security free from arbitrary interference by the Executive in a manner that could affect judicial independence.

⁶⁶ *De Lange v Smuts* (note 50) para 69.

⁶⁷ Para 70.

⁶⁸ In *R v Généreux* it was held that ‘the status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by ‘any other external force, such as business or corporate interests or other pressure groups.’ This interpretation was adopted by the Constitutional Court in *De Lange v Smuts* at para 72.

- Security of tenure ‘which embodies as an essential element the requirement that the decision-maker be removable only for just cause;’ ‘secure against interference by the Executive or other appointing authority.’
- Institutional independence ‘with respect to matters that relate directly to the exercise of the tribunal's judicial function... judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.’⁶⁹

These aspects guarantee external independence.⁷⁰ At a global level, Lehtimaja and Pellonpaa correctly state that it is not easy to compile an exhaustive list of criteria for the independence of the judiciary given the variety of existing judicial systems.⁷¹ However, they assert, correctly, that the following are the most crucial areas: manner of appointment and discharge; degree of stability and non-removability from office; conditions of service as well as physical, political, legal and logistical protection against outside pressures and harassment.⁷² Although the Constitutional Court shied away from the international debate when discussing the essential requirements for judicial independence, it can be seen that the requirements adopted by the Court and suggestions by Lehtimaja and Pellonpaa are very similar.

Recently, the Constitutional Court acknowledged in an unprecedented case of *Justice Alliance of South Africa v President of the Republic of South Africa and Others* that ‘[j]udicial independence in a democracy is recognised internationally.’⁷³ The expansive

⁶⁹ *Ibid* para 70 (footnotes omitted). The Court also highlighted the distinction between independence and impartiality. I revert to this later in this further below.

⁷⁰ J Franco & C Powell ‘The Meaning of Institutional Independence in *Van Rooyen v The State*’ (2004) 121 (4) *South African Law Journal* 562, 564.

⁷¹ L Lehtimaja & M Pellonpaa ‘Article 10’, in Gundmundur Afredsson & Asbjørn Eide (eds.) *The Universal Declaration of Human Rights: a common standard of achievement* 228.

⁷² *Ibid*.

⁷³ 2011 (5) SA 388 (CC) para 38. This case considered the constitutionality of an Act of Parliament which purported to give the President the power to extend the term of office of the incumbent Chief Justice. In a unanimous judgment the Court found

requirements of judicial independence are found in numerous international declaratory instruments. The most important of these is the *United Nations Basic Principles on the Independence of Judiciary (UN Principles)*.⁷⁴

The UN Principles are designed to secure and promote the independence of the judiciary.⁷⁵ The Principles focus on the independence of the judiciary, freedom of expression and association, qualifications, selection and training, conditions of service and tenure, professional secrecy and immunity and discipline, suspension and removal from office. Most of these principles are generally captured in chapter eight of the Constitution in varying degrees.⁷⁶ Closer to home, the African Union has adopted the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Union Principles and Guidelines)*.⁷⁷ Both the African Union and the UN Principles have, in general, been referred to with approval by the Constitutional Court.⁷⁸

that both the Act and the subsequent extension of the term of office of Ngcobo CJ to be constitutionally invalid because they were offensive to s 176(1) of the Constitution.

⁷⁴ Adopted by the Seventh United Nations Congress on the Prevention and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by GA res 40/32 and 40/146 of 13 December 1985. According to the Preamble of the Principles, they are formulated to assist Member States in their task of securing and promoting the independence of the judiciary and ‘*should be taken into account and respected by the Governments within the framework of their national legislation and practice...*’ (own emphasis). The African Commission has referred to these principles on numerous occasions to justify its conclusions on the violation of the right to fair trial in the *African Charter*. Another declaratory document adopted recently is the *Bangalore Principles of Judicial Conduct*. It was adopted by the Judicial Group on Strengthening Judicial Integrity in November 2002. I should also point out that, apart from these two, there are numerous documents on judicial independence (for a brief indication, see *The Judicial Institution in Southern Africa* (2006) 1-13; but the most frequently cited is the *UN Basic Principles on Judicial Independence*).

⁷⁵ Preamble of the *UN Basic Principles on the Independence of Judiciary*.

⁷⁶ See in particular ss 165, 174-178 and s 180.

⁷⁷ DOC/OS(XXX)247.

⁷⁸ *Justice Alliance of South Africa v President of the Republic of South Africa* (note 73 above) paras 38-39.

However, the most rigorous and elaborate conditions of judicial independence cannot feasibly be applied to a variety of tribunals.⁷⁹ This suggests that the elaborate and rigorous conditions of judicial independence may be applied differently to a range of tribunals. However, ‘the essence of the security afforded by the essential conditions of judicial independence must be provided or guaranteed;’⁸⁰ but this does not need to be done by any particular legislative or constitutional scheme.⁸¹ In the context of s 165 of the Constitution which constitutionalises the core values of judicial independence and accords such values to all courts, it means that ‘all courts are entitled to and have the basic protection that is required.’⁸²

In *De Lange*, the Constitutional Court did not elaborate on the essential conditions for judicial independence. It simply just introduced them; but the Court did elaborate on these conditions in the subsequent cases, especially in *Van Rooyen*.⁸³ An analysis of each of the above requirements drawn from these cases follows.

(a) Basic degree of financial security

Judicial officers must have a basic degree of financial security.⁸⁴ In relation to the position of magistrates, the Constitutional Court has indicated that it is unclear whether it should be the executive or the legislature to determine what is meant by basic financial security.⁸⁵

⁷⁹ *R v Valente* (note 63 above) 175. This statement appears to have paved the way for the Court to accept a lower standard of judicial independence for magistrates’ courts in *Van Rooyen*. In this case, the Court attached significant weight to the fact that the Constitution itself differentiates between the different courts and between the procedures for the appointment of different judicial officers.

⁸⁰ *De Lange v Smuts* (note 50 above) para 72.

⁸¹ *Ibid.*

⁸² *Van Rooyen v The State* (note 54 above) para 22.

⁸³ *Ibid.*

⁸⁴ *De Lange v Smuts* (note 50 above) para 70.

⁸⁵ *Van Rooyen v The State* (note 54 above) para 138. However, it is worth noting that the UN Principles require that the law should secure adequate remuneration and conditions of service for judicial officers. This suggests that the legislature, as the law making body, should somehow be involved in determining basic financial security of judicial officers.

The Court acknowledges that this is a difficult area for which there are no easy solutions.⁸⁶ The Court was nevertheless able to establish three requirements of basic financial security while grappling with it in the context of magistrates. These are (a) adequate remuneration;⁸⁷ (b) safeguards to avoid arbitrary reduction of salaries of judicial officers;⁸⁸ and (c) an assurance that judicial officers should not be put in a position to engage in negotiations with the executive over their salaries because they are not employees and cannot resort to industrial action to advance their interests in their conditions of service.⁸⁹

However, it must be noted that in the second *Certification* case, the Constitutional Court held that there is no obligation to establish independent structures to serve as a filter between the judiciary and the executive; and that this is a matter of political choice, not mandatory for securing judicial independence.⁹⁰ On the other hand, the Court recognises, in *Van Rooyen*, that such structures play a crucial role in the determination of salaries and conditions of service for judicial officers.⁹¹ The views of the Court in the second *Certification* case and in the latter case of *Van Rooyen* appear to signal confusion or uncertainty on the part of the Constitutional Court on whether independent structures are an imperative requirement in dealing with the salaries of judicial officers.⁹²

That said, in *Valente*, financial security and security of tenure were seen as safeguards of the individual judge's freedom from outside influence.⁹³ In the later Canadian cases of *Reference re: Public Sector*

⁸⁶ *Ibid.*

⁸⁷ *Van Rooyen v The State* (note 54 above) para 138.

⁸⁸ *Ibid* para 149.

⁸⁹ *Ibid* para 139.

⁹⁰ Note 46 above paras 59 and 124.

⁹¹ *Van Rooyen v The State* (note 54 above) paras 145-148.

⁹² The UN Principles do not completely clarify this issue and simply require that these matters 'shall be adequately secured by law'. See Principle 11 in this regard.

⁹³ (1985) 24 DLR (4th) 161 (SCC).

Pay Reduction Act (PEI), Attorney General of Canada et al, Interveners; Reference re: Independence of Judges of Provincial Court, Prince Edward Island, Provincial Court Act and Public Sector Pay Reduction Act; Attorney General of Canada et al, Interveners,⁹⁴ the Court held that financial security and security of tenure are essential to the protection of both the individual and institutional independence.⁹⁵ The importance of basic financial security and security of tenure clearly requires that strong measures be taken to secure them adequately.

(b) Security of tenure

The Constitution does not say much on the security of tenure of ‘other judicial officers’ such as military judges or magistrates. Terms of office for South African judges are regulated in s 176 of the Constitution. The terms of office for ‘other judicial officers’ such as military judges and magistrates are regulated in national legislation.⁹⁶ Section 174(7) of the Constitution states that

other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

On the tenure of appointment, judicial officers need not necessarily be appointed for life⁹⁷ but it is essential that judicial assignments be ordinarily fixed for a longer period of time.⁹⁸ It has been suggested that judicial appointments should at least be fixed for several years.⁹⁹ Recently, the Constitutional Court has made some remarks about renewability of a judicial term of office. In *Justice Alliance v The President of South Africa* the Court spoke against renewability of a

⁹⁴ (1997) 150 DLR (4th) 577.

⁹⁵ *Ibid* para 123.

⁹⁶ For example, those of military judges are mainly (but not specifically) regulated in the Military Discipline Supplementary Measures Act 16 of 1999.

⁹⁷ Manfred Nowak (ed.) *UN Covenant on Civil and Political Rights CCPR Commentary* (1993) 245.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

term of office of a judicial officer when it stated that '[i]t is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence (footnotes omitted).'¹⁰⁰ The problem with short-term renewable appointments is that these may potentially compromise judicial independence.¹⁰¹ The possibility of a judicial officer working for the renewal of his or her term instead of administering justice cannot be ruled out.¹⁰² The Constitutional Court stated, further, in *Justice Alliance of South Africa*, that 'non-renewability is the bedrock of security of tenure' and 'fosters confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal.'¹⁰³ Furthermore, if a judicial term is renewable, a judicial officer 'may feel obliged not to offend anyone who might influence his or her re-appointment.'¹⁰⁴ In addition, the Court also stated that extension of a term of office may be seen as a benefit conferred upon those judges favoured by the executive or by Parliament.¹⁰⁵

That said, it is not entirely clear if appointments fixed for a reasonable period of time and which are renewed by an independent structure would be offensive to the principle of judicial independence. In my view, this may not necessarily be offensive because the existence of an independent structure would serve as a balancing mechanism. I revert to this point in Chapter Seven.

The Constitutional Court has not said much on the requirements of security of tenure for judicial officers. It has, to a limited extent, only dealt with some aspects of removal and discipline

¹⁰⁰ Note 73 above, para 73.

¹⁰¹ See Tshivhase (note 60 above) 115.

¹⁰² *Ibid.*

¹⁰³ Para 73.

¹⁰⁴ *The Judicial Institution in Southern Africa* (note 43 above).

¹⁰⁵ *Justice Alliance of South Africa v The President of South Africa* (note 73 above) para 75.

of judicial officers. Borrowing from the Canadian Supreme Court, the Court has stated that the requirement for security of tenure is that the decision-maker must be removable only for just cause and must be secure against interference by the Executive or other appointing authority.¹⁰⁶ In *Van Rooyen*, it was held that ‘protection against removal from office lies at the heart of judicial independence.’¹⁰⁷ This protection enables judicial officers to apply the law impartially and without the fear of being removed from the office or securing their future.

On the issue of disciplining judicial officers, the Court has established the principle that this should be done appropriately and by appropriate authorities. This principle is evident from the Constitutional Court’s view in *Van Rooyen* that the executive should not have the power to exercise discipline over judicial officers and to punish them for misconduct.¹⁰⁸ The Court further stated that doing so would place judicial officers in a subordinate position in relation to the government and this is inconsistent with judicial independence.¹⁰⁹ The Court made these remarks with regard to the Minister of Justice who had the power to exercise discipline over magistrates and to punish them for misconduct.

Although the Constitutional Court is yet to make pronouncements on the requirements of security of tenure and the term of office for ‘other judicial officers,’ the above discussion shows that it has made some remarks which offer some guidance on what would likely pass constitutional muster on these aspects.

¹⁰⁶ *De Lange v Smuts* (note 50 above) para 70.

¹⁰⁷ *Van Rooyen v The State* para 161.

¹⁰⁸ *Ibid* para 179.

¹⁰⁹ *Ibid*.

(c) Institutional independence

Institutional independence is the independence between the courts from other arms of government¹¹⁰ and other sources of undue influence. In the context of military courts, it would also include independence of military courts from the military command. It protects judges as a collective.¹¹¹ It is an essential condition of judicial independence that the tribunal is institutionally independent with respect to matters that relate directly to the exercise of the tribunal's judicial function and judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.¹¹² This relates to the overall control that judges have over the job they do and matters related to their job.

The Constitutional Court has stated that structural independence proclaimed in s 165 of the Constitution is an indispensable part of judicial independence.¹¹³ This suggests that institutional independence is one of those requirements which under no circumstances can be compromised. All courts have to be institutionally independent from other arms of government. As will be seen in Chapter Seven, this requirement is difficult to apply to military courts given the hierarchical nature of the military and the relationship between the military and its members.

(d) Distinction between judicial independence and impartiality: The elusive tests

There is no doubt that 'access to courts that function fairly and in public is a basic right.'¹¹⁴ The Constitutional Court has recently stated

¹¹⁰ *Van Rooyen v The State* (note 54 above) paras 18-20.

¹¹¹ *Franco & Powell* (note 70 above) 564.

¹¹² *De Lange v Smuts* (note 50 above) para 70.

¹¹³ *Ibid* para 59.

¹¹⁴ *S v Basson* 2007 (3) SA 582 (CC) para 23. This case dealt with application for leave to appeal against the outcome of criminal proceedings involving a high profile accused in relation to some activities of the apartheid era. The judgment of the Court considered, among other things, allegations of bias. The Court held that

that the impartiality of judicial officers is an essential requirement of a constitutional democracy and is closely linked to the independence of courts.¹¹⁵ How are the two linked? Can one be viewed to be independent from the other?

The distinction between impartiality and independence is not always clear; but in *Valente*, the two were held to be distinct and separate requirements,¹¹⁶ and this approach was endorsed by the Constitutional Court in *De Lange*.¹¹⁷ The Canadian Supreme Court stated that ‘impartiality refers to a state of mind or attitude in relation to the issues and the parties in a particular case.’¹¹⁸ It connotes the absence of bias, actual or perceived.¹¹⁹ This relates to an internal or subjective facet of independence.

Similarly, *Findlay v The United Kingdom (Findlay)* refers to two aspects of impartiality.¹²⁰ Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must be impartial from an objective point of view in that it must offer sufficient guarantees to exclude any legitimate doubt of impartiality.¹²¹

What is the legal test for impartiality? In South Africa, the test for impartiality is one of reasonable apprehension of bias, as established

although some of the judge’s remarks and behavior could be considered inappropriate, it could not be said to give rise to a reasonable apprehension of bias.

¹¹⁵ *Ibid* para 24.

¹¹⁶ Note 63 above, 169-70.

¹¹⁷ *De Lange v Smuts* (note 50 above) para 73.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*. This is in contrast with a political science perspective where everything in the political system is connected to everything and ‘nothing in the political system is without bias.’ See Russell (note 20 above) 2 in this regard. According to him, the analytical challenge is to ascertain what kinds of independence and impartiality are possible and desirable.

¹²⁰ *Findlay v The United Kingdom* (1997) ECHR 8, para 73.

¹²¹ *Ibid* para 73. These are guarantees of independence and this requirement emphasises the strong relationship between impartiality and independence.

in *South African Rugby Football Union and Others v President of the Republic of South Africa (SARFU)*¹²² and confirmed in *S v Basson*:¹²³

The question is whether a reasonable, objective and informed person would on correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour.

The perception of the impartiality of a judicial officer is crucial in the administration of justice.¹²⁴ The test in both *SARFU* and *Basson* is similar to that in *Cooper v The United Kingdom (Cooper)*.¹²⁵ In this case, the European Court of Human Rights reiterated its holding in *Findlay* that the standpoint of the accused is important, without being decisive in deciding whether a particular court lacks independence and impartiality.¹²⁶ Instead, what is decisive is whether the doubts of the accused are objectively justified.¹²⁷ However, the test in *Cooper* is not very helpful for the purposes of drawing a clear distinction between impartiality and independence because the Court used the said test to establish whether a military court lacked both independence and impartiality.

¹²² 1999 (4) SA 147 (CC). This case was an application for recusal, which implicated each of the members of the Constitutional Court, but was directed at five judges only. The fourth respondent laid claim to a reasonable apprehension on his part that the specified justices would be biased. The Court held that the question was whether a reasonable, objective and informed person would reasonably apprehend that the judicial officer in question had not or would not bring an impartial mind to bear on the adjudication of the case. The Court set out its reasons for finding that on an application of this test to the facts, the application for recusal fell to be dismissed.

¹²³ Note 114 above para 25.

¹²⁴ *The State v Basson* (2005) (1) SA 171 (CC), para 27. In *De Lange v Smuts* (note 50 above) para 71, the Court stated that: 'Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.'

¹²⁵(2003) ECHR 686 <http://www.worldlii.org/eu/cases/ECHR/2003/686.html> (accessed on 10 February 2006).

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

How does impartiality differ from judicial independence? Both relate to a state of mind in the actual exercise of judicial functions but judicial independence also includes a status or relationship resting on objective conditions or guarantees.¹²⁸ What then is the test for judicial independence? In *Valente*, the Court took the view that the test for judicial independence should be ‘whether the tribunal may be reasonably perceived as independent’ as is the case for impartiality as well.¹²⁹ In *Van Rooyen v The State*, the Court, borrowing from a United States court, explained that the question for independence and impartiality was how things appeared to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.¹³⁰ This means that the test for both impartiality and judicial independence should generally be the same i.e. reasonable perception. However, the perception must be ‘whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.’¹³¹

In the final analysis, it is important that a tribunal should be perceived as independent as well as impartial.¹³² The two have been held to be important for two reasons—that they are fundamental to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice.¹³³ The two appear to be two sides of the same coin although they are tested differently but using the same principle—reasonable perception. To summarise, the test for impartiality focuses on the existence of a factor or factors

¹²⁸ *De Lange v Smuts* (note 50 above) para 71.

¹²⁹ *Ibid.* The Court stated that the test for independence should also include perception.

¹³⁰ *Van Rooyen v The State* (note 54 above) para 34.

¹³¹ *De Lange v Smuts* (note 50 above) para 104.

¹³² *Ibid.*

¹³³ *Ibid.* In the same breadth, the Court stated that a system without individual and public confidence cannot command the respect and acceptance that are essential for its operation.

which will lead to a reasonable apprehension of bias on the part of the court. On the other hand, the test for judicial independence focuses on the reasonable perception informed by the existence or lack thereof, of the objective conditions or guarantees of judicial independence. Finally, the Constitutional Court has to be commended for having developed a clearer test for impartiality as evidenced in *SARFU* and *Basson*.

However the court has followed a controversial approach to the independence of lower courts.

(e) Lower Courts and the Constitutional Court's approach to their independence

In *Van Rooyen*,¹³⁴ the Constitutional Court has followed a controversial approach to the independence of lower courts. The Court accepted a lower standard of independence in relation to magistrates' courts than it requires of the High Courts. It did this for several reasons: (a) that the Constitution provided for a hierarchy of courts and in its view this justifies the different degrees of independence;¹³⁵ (b) that higher courts deal with matters which were seen to be 'the most sensitive areas of tension between the Legislature, the Executive and the Judiciary';¹³⁶ and (c) that the increased level of institutional independence at the higher level was justified because the High Courts are in themselves a means of ensuring and guarding the independence of lower courts through the mechanism of judicial review.¹³⁷

The central argument of the Court suggests that judicial review is the remedy by which the lowered standard of independence is

¹³⁴ *Van Rooyen v The State* (note 54 above).

¹³⁵ *Ibid* para 28.

¹³⁶ *Ibid* para 25.

¹³⁷ *Ibid* paras 21-24.

justified.¹³⁸ In the context of military courts, this would mean that the remedy to the lower standard of independence of military courts is judicial review by the Court of Military Appeals and higher civilian courts.¹³⁹ That said, the Constitutional Court did not say that it is acceptable for lower courts not to enjoy the basic requirements of judicial independence or the essential conditions for judicial independence. All the Court said was that lower courts do not necessarily have to be independent in the same way as superior courts. This means that all courts must meet the basic requirements or essential conditions for judicial independence regardless of their status. It is on that premise that military courts will be evaluated in the chapter assessing their independence.

4.5 Concluding remarks

The main aim of this chapter has been to assess the meaning of judicial independence. The chapter started by considering the notion of judicial independence in an historical context in order to understand its philosophical foundation. In this chapter, a number of key aspects were established regarding judicial independence.

The key observations and findings can be summarised as follows:

- There is no general theory on judicial independence among liberal democracies.
- Judicial independence is an essential part of the separation of powers but it cannot be fully realized, just as the Constitutional Court has observed that there is no separation that is absolute.

¹³⁸ The Constitutional Court's approach has been criticized by Franco and Powell, note 70 above, 575 for two reasons: Firstly, that judicial review is not a unique protective mechanism. It is rather a feature available to all South Africans. Secondly, reliance on judicial review remedies infringements of independence but does not prevent them. This means that Franco and Powell basically argue for prevention than cure which is almost always a better approach to many things in life; but this approach is not always applicable.

¹³⁹ Tshivhase (note 60 above) 127.

It can therefore be seen as an ideal to strive towards although one must at least aim at achieving an acceptable degree of independence rather than full independence. This can be done by ensuring that courts enjoy the basic requirements of judicial independence.

- There is a whole range of things that could be done to satisfy the requirements of judicial independence given that the Constitution speaks of legislative and other measures. The Constitution provides very limited detail on measures that could be adopted in order to guarantee the independence of lower courts.
- By way of summary, the cases of *De Lange v Smuts* and *Van Rooyen* show that the essential requirements for judicial independence are: individual judge's freedom to decide cases as they see fit, institutional independence of the courts, basic degree of financial security and security of tenure. Each of these requirements has been described as either at the centre of judicial independence, at the heart of judicial independence or indispensable. This marks the equal importance of each of these requirements for all courts regardless of their status.
- In between the above-mentioned requirements, there is much detail which needs to be filled by the executive, the legislature and ultimately the courts. Each of these requirements has been given some interpretation and there is no single correct formula for achieving them. Moreover, the most rigorous and elaborate conditions of judicial independence may be applied differently to a variety of tribunals—as long as the basic protection is guaranteed.

The Constitutional Court's approach to the independence of lower courts in *Van Rooyen* forms an important part of that Court's jurisprudence on judicial independence. Although the approach in question sanctions different degrees of independence for a variety of

courts, it does not detract from the uniform application of the basic requirements of judicial independence to all courts. This means that all courts (military courts included) must at least enjoy the essential requirements for judicial independence.

CHAPTER 5

INTERNATIONAL LAW AND MILITARY COURTS: ASSESSING THE APPLICABILITY OF FAIR TRIAL AND JUDICIAL INDEPENDENCE STANDARDS

5.1 Introductory remarks

The application of the right to a fair trial and to be tried by an independent and impartial tribunal in a military context is not without difficulty in international law. The difficulty arises because the relevant international legal instruments provide room for arguments that such instruments do not apply to military courts. This state of affairs provides a partial explanation as to why military courts in many parts of the world have operated in ignorance of elements of fair trial and judicial independence standards for decades. As will be noted further below, some countries in Europe have even entered reservations to the effect that articles dealing with the right to a fair trial and the right to be tried by an independent and impartial tribunal would not apply to their military courts in the context of the European Convention on Human Rights. This shows that there is a strong view against the application of fair trial standards to military courts.

Building on the discussion in Chapters Two and Three this chapter assesses the application of the international legal framework on judicial independence and the right to a fair trial to military courts, with some emphasis on South Africa for obvious reasons. It seeks to answer the question whether this framework applies to military courts. Its objective is to show that despite the technical difficulties, it is possible to conclude that these standards apply to military courts. It has already been concluded in Chapter Two that the principle of judicial independence applies to South African military courts because they are part of the judicial system provided for in the Constitution. The question raised in this chapter might appear to

be moot in the light of that conclusion, nevertheless it is essential for several reasons. One of the reasons is that military courts also operate internationally such as when they are involved in peace keeping and other similar missions. Moreover, the Constitution requires security services to operate in accordance with international law. It is therefore important to clarify the applicability of the relevant law.

The Chapter also analyses developments at the United Nations (UN) specifically aimed at the universal regulation of military tribunals, and generally expresses a view in support of the move to regulate military courts internationally.

5.2 Does the international legal framework on judicial independence and fair trial apply to military courts?

South African military courts cannot operate in ignorance of international law particularly because section 199(5) of the Constitution provides that '[t]he security services must act...in accordance with...customary international law and international agreements binding on the Republic.' A number of international instruments binding on the Republic require independent and impartial courts. Almost all of these instruments are in the field of human rights. They link judicial independence with the right to a fair trial. Thus, judicial independence is seen as a prerequisite for the enjoyment of the right to a fair trial.

The starting point is the Universal Declaration of Human Rights (UDHR).¹ Article 10 of the UDHR provides that '[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any

¹ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

criminal charge against him.² Similarly, Art 14(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that '[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'³

The concern with regard to the language used in the UDHR and the ICCPR above is that the two articles leave room for an argument that they do not apply to military courts in certain circumstances. For example, where military courts only have jurisdiction to try military personnel for pure military offences, arguments could be raised that the relevant provisions of the UDHR and the ICCPR do not apply. In such a situation, when a military court tries a soldier for a military offence, it is clearly not acting in determination of a criminal charge, and some could argue that it is also not acting in determination of 'rights and obligations' of the military accused person. However, a counter to that argument is that when a military court tries a person for a military offence, it is in effect deciding on the rights and obligations of that person—in the context of the offence in question. For example, many military offences carry a sentence of imprisonment which has an impact on the freedom rights of the convicted soldier.

The UN Human Rights Committee (HRC), which monitors the implementation of the ICCPR, has, in any event, stated that the right to be

² The UDHR was adopted as a declaratory instrument not meant to be binding. However, some scholars have argued that '[b]y virtue of its widespread acceptance, the Universal Declaration has gradually assumed an independent status as a statement of customary international law': see H Phillip, 'Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously' (2002) 33 *Columbia Law Review* 2. In the terms of the South African Constitution, s 232: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution.' It can hardly be argued that Art 10 of the UDHR is inconsistent with the Constitution. South Africa is bound by those aspects of the UDHR which have attained the status of customary international law.

³ Opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 May 1976). Another international instrument recognising the principle of judicial independence is the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, GA res 45/158, Art 18 (entered into force 1 July 2003).

tried by an independent and impartial tribunal '[i]s an absolute right that may suffer no exception.'⁴ Moreover, '[t]he provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized.'⁵ Unfortunately, the HRC did not discuss the interpretive difficulties highlighted above but its assertions help in clarifying the application of Art 14 to military courts. The comment of the HRC suggests that even specialised courts such as military courts which have powers to try criminal offences are no exception to the requirement of judicial independence.⁶

Pleasingly, the interpretive problems discussed above are of little concern in the context of South Africa because South African military courts have jurisdiction to try both military and criminal offences. In the light of this fact, it is not difficult to conclude that these courts fall within the scope of the relevant articles by virtue of their wide jurisdiction.

Moving on to other international instruments, the Geneva Convention (III) Relative to the Treatment of Prisoners of War offers something different. It is the only universal instrument which explicitly requires military courts to be independent and impartial.⁷ The only problem is that the Convention is not a full cure to the interpretive problems highlighted above because it only applies 'to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...' and 'to all cases of partial or total occupation of the territory of a High Contracting

⁴ UN Human Rights Committee, Communication No. 263/1987, *M. Gonzalez del Rio v Peru*, UN Doc CCPR/C/46/D/263/1987 (1992), para 5.2.

⁵ UN Human Rights Committee, General Comment No 13 (Equality before the courts and the right to a fair and public hearing by an independent court established by law) Twenty-first session (1984), para 4.

⁶ In its 1999 concluding observations on Colombia, the HRC recommended that 'the new draft Military Penal Code, if it is to be adopted, must comply in all respects with the requirements of the Covenant.': UN Human Rights Committee, Concluding Observations: Columbia, UN Doc CCPR/C/79/Add.76 (1997), para 18.

⁷ Geneva Convention (III) Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135, Art 84 (entered into force 21 October 1950): this article requires prisoners of war to be tried in a military court which offers essential guarantees of independence and impartiality. It does not stipulate the nature of offences or trial as is the case with the UDHR and the ICCPR. South Africa has ratified this Convention.

Party⁸ and can only be invoked if one is dealing with prisoners of war or victims of war.

However, the fact that the Prisoners of War Convention specifically requires military courts to be independent in the above circumstances suggests that international humanitarian law generally expects military courts to be independent. If that is not how we should read the Convention, it will be difficult to expect countries to be able to comply with the provisions of Art 84 of the above-mentioned Convention because it might be impractical or unrealistic, during an armed conflict, to expect a country which generally operates non-independent military courts for its citizens, all of a sudden to set up independent military courts in order to satisfy the provisions of Art 84 in relation to prisoners of war or victims of war.

In addition to the universal instruments referred to above, regional instruments must also be considered as they form part of international law. The American Convention on Human Rights⁹ and the European Convention on Human Rights (ECHR)¹⁰ follow the path of the UDHR and the ICCPR. Article 6(1) of the ECHR stipulates that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal established by law.'

Although not binding on South Africa, the European Court of Human Rights has developed a useful criterion to tackle interpretive problems associated with that article as seen in the context of a similar article in the ICCPR. This refers to the two-fold criterion developed in the earlier cases of the Court, most notably in *Engel v Netherlands*.¹¹ The criterion has already been discussed in Chapter Three. By way of emphasis and at the risk of repetition, the starting point of the enquiry is whether the offence charged

⁸ Article 2.

⁹ American Convention on Human Rights, opened for signature 22 November 1969, 1144 UNTS 123, Art 8 (entered into force 18 July 1978).

¹⁰ European Convention on Human Rights, opened for signature 4 November 1950, Art 6(1) (entered into force 3 September 1953).

¹¹ (1976) 1 EHRR 647.

belongs, according to the legal system of the state concerned, to criminal law, disciplinary law or both.¹² Proceedings before military courts assume both a criminal and disciplinary character because the principles of liability are those applied in criminal law, the procedure followed is similar to that in criminal courts, and the sentencing processes assume a criminal character but with some emphasis on discipline. This means that the first criterion would be met with respect to military courts at least according to the logic of the jurisprudence of the European Court of Human Rights.

Furthermore, the supervision of the court in relation to the offence goes further, and takes into consideration the degree of severity of the penalty that the person concerned risks incurring. The court looks at the maximum potential penalty for which the relevant law provides. In *Bell v United Kingdom*, the Court considered a sentence of detention for a period of 28 days to be a deprivation of liberty which was serious enough to render the charge against the accused to be of a criminal nature which attracts the application of Art 6 of the Convention.¹³ Most military offences carry a sentence of imprisonment, among other sentences. It would therefore be easy to conclude that the right in question applies to military courts without any doubt.

Apart from applying the right under discussion to summary trials, the European Court of Human Rights has also applied the same right to cases involving fully-fledged military courts. Some of the most famous cases which dealt with the said rights in the context of military courts are *Findlay v The United Kingdom* (1997) ECHR 8 and *Cooper v The United Kingdom* (2003) ECHR 686.¹⁴ In both cases, the British military court system was found to fall short of the right to a fair trial provided for in the European Convention.

¹² Ibid, para 82. See also *Bell v United Kingdom* (2007) 45 EHRR 24.

¹³ Ibid, para 41-42. As a result of attacks launched against the UK's military justice system based on Art 6 of the Convention, there have been calls in Parliament for the United Kingdom to withdraw from the Convention and re-ratify with an appropriate reservation against that article. See Peter Rowe 'A New Court to Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court' (2003) 8 *J Conflict & Security Law* 201, 202.

Findlay led to a substantial reform of the British military court system which culminated in the enactment of the Armed Forces Act of 1996 while further changes were introduced by the Armed Forces (Discipline) Act 2000 and the Armed Forces Act 2001.

That said, some states entered a reservation that articles dealing with the right to a fair trial and the right to be tried by an independent and impartial tribunal would not apply to disciplinary structures within their military establishments.¹⁵ This illustrates the sensitivity of applying the right to a fair trial in the context of military courts. However, the United Kingdom did not enter a reservation—which made it possible to reach the outcomes in *Findlay* and *Cooper* respectively.¹⁶

Attention now turns to the Americas. Article 8(1) of the American Convention provides that

[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal...in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.

Based on the above article, the Inter-American Court of Human Rights questioned the independence of military courts in Peru in the case of *Castillo Petruzzi et al*¹⁷ because it found the members to be lacking impartiality as the armed forces were engaged in the counter-insurgency struggle and also prosecuting persons associated with insurgency groups.¹⁸ The Court found this to weaken the impartiality of members of military courts considerably.¹⁹ Furthermore, the Court also raised the concern that members of military

¹⁵ Among those countries are Portugal, Spain, Slovakia, Moldova, France, The Czech Republic, Turkey, Lithuania and Ukraine.

¹⁶ See Rowe (note 13 above) 202.

¹⁷ 1999 Inter-American Court of Human Rights, online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf> (Accessed 12 July 2012), in particular paras 130-134. This case dealt with trial of civilians facing treason charges before the FAP Special Military Court of Inquiry and the Special Tribunal of the Supreme Court of Military Justice respectively. The Court found (unanimously), among other things, that Peru had violated Art 8(1) of the American Convention.

¹⁸ *Ibid* para 130.

¹⁹ *Ibid*.

courts were appointed by the relevant minister.²⁰ However, the holding of the Inter-American Court is of little value because it was made in the context of trial of civilians by a military court and not trial of soldiers by a military court. This fact appears to have weighed heavily in the reasoning of the court as to the nature of standards required of such courts.²¹ It is common cause that civilians should be tried by independent and impartial tribunals.

Moving on to the African continent, the African Charter on Human and Peoples' Rights (African Charter) follows a different approach from its counterparts.²² Article 7(1) of the Charter provides, among other things, that '[e]very individual shall have his cause heard' and have '[t]he right to be presumed innocent until proved guilty by a competent court or tribunal' and '[t]he right to be tried within a reasonable time by an impartial court or tribunal.' Unlike all other instruments referred to above, Art 7(1) of the Charter refers to the right to be tried by an impartial court or tribunal without being specific about the nature of the trial or accusations. This means that the trial referred to in this article is not limited to a criminal trial. To cement these rights, Art 26 of the African Charter stipulates that the States parties '[s]hall have the duty to guarantee the independence of the Courts.' As will be seen further below, courts referred to in Art 26 include military courts. The result of this is that South Africa has an international obligation to ensure that all courts are independent including military courts.

The African Commission on Human and Peoples' Rights (African Commission) has dealt with numerous complaints concerning military courts. It has noted in a resolution that

²⁰ *Ibid.*

²¹ See in particular paras 128-129.

²² African Charter on Human and Peoples' Rights, opened for signature 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5 (entered into force 21 October 1986). South Africa has ratified the African Charter.

in many African countries military courts and special tribunals exist alongside regular judicial institutions. The purpose of military courts is to determine offences of a pure military nature committed by military personnel. *While exercising this function, military courts are required to respect fair trial standards* (emphasis added).²³

As already mentioned, fair trial includes a trial by an independent and impartial tribunal. Furthermore, the Commission has stated that the establishment of a 'military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process' but went on to point out that these courts 'must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process.'²⁴

The position adopted by the African Commission augurs well for the growing recognition in international law of the idea that military courts should act consistently with principles of judicial independence and the right to a fair trial. The work being undertaken on the question of administration of justice through military courts by the UN Sub-Commission on the Promotion and Protection of Human Rights, expected to be completed with the development of international standards on military jurisdiction, confirms that recognition.²⁵

5.3 The United Nations move towards the universal regulation of military courts

An analysis of the international instruments above has shown that some interpretive problems exist regarding the application of such instruments to

²³ African Commission on Human and Peoples' Rights, Dakar Declaration and Recommendations Twenty-sixth Session (1999), para 3 in Christof Heyns (ed.) *Human Rights in Africa: Vol 1* (2004) 586.

²⁴ African Commission on Human and Peoples' Rights (2001) Communication 218/98 (Nigeria), para 44.

²⁵ See the following reports of the UN Sub-Commission on the Promotion and Protection of Human Rights, *Administration of Justice: Issue of the administration of justice through military tribunals*, UN Doc E/CN.4/Sub.2/2002/4, Fifty-fourth session (2002), Administration of Justice Report of the sessional working group on the administration of justice UN Doc E/CN.4/Sub.2/2001/7, Fifty-third session (2001). These developments will be considered in some detail further below.

military courts. Almost all the international instruments considered do not make explicit reference to military courts or military offences. As the UN Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights notes in his report, relevant treaty bodies have, however, ‘developed a restrictive interpretation in this area’²⁶ presumably in order to fill some of the gaps. The lack of clear international regulation of military courts has created an environment which is conducive to the establishment of military courts that operate with limited or lack of respect to the principle of judicial independence and the right to a fair trial.

The International Commission of Jurists (ICJ) studied military courts in various jurisdictions and concluded that

on the whole, as far as ensuring that justice is dispensed independently and impartially is concerned, military courts do not adhere to the general principles and international standards and their procedures are in breach of due process. In many countries, so-called ‘military justice’ is organizationally and operationally dependent on the executive.²⁷

More importantly, the Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights has been studying the issue of the administration of justice through military courts for several years. This process produced a number of reports and recommendations which were submitted to the Sub-Commission.²⁸ Finally, the several studies conducted by the Special Rapporteur have culminated in the submission of a report which includes Draft Principles Governing the Administration of Justice through Military Tribunals (draft principles).²⁹ These principles were

²⁶ (E/CN.4/Sub.2/2002/4), report submitted to the Sub-Commission by Mr. Louis Joinet.

²⁷ International Commission of Jurists *Military jurisdiction and international law* www.icj.org/news.php3?id_article=3254&lang=en [Accessed 20 June 2007]. The study included countries such as Poland; Spain; Norway; Switzerland, the United Kingdom; the United States; a number of South American countries to name but a few. Unfortunately, none of the African countries were studied.

²⁸ See reports drawn up by Mr. Louis Joinet (E/CN.4/Sub.2/2001/WG.1/CRP.3, (E/CN.4/Sub.2/2002/4), and the reports by Mr. Emmanuel Decaux to the fifty-fifth session (E/CN.4/Sub.2/2003/4), fifty-sixth session (E/CN.4/Sub.2/2004/7) and fifty-seventh session (E/CN.4/Sub.2/2005/9).

²⁹ E/CN.4/2006/56 published on 13 January 2006. See Michael R. Gibson ‘International Human Rights Law and Administration of justice through Military Tribunals: Preserving

submitted to the Commission on Human Rights at its sixty-second session in 2006. It is hoped that this may lead to the international regulation of military courts.

Analysis of the Draft Principles Governing the Administration of Justice through Military Tribunals

The publication of the draft principles is a progressive step, and perhaps one which could also be described as long overdue in the light of gross non-compliance with international standards by military courts in many countries. The final report referred to above contains twenty draft principles governing the administration of justice through military tribunals. The majority of the principles are followed by an explanatory note of each principle, and some of these focus on the relevant treaty which informs the principle. However, the principles are not flawless.³⁰

What led to the development of these principles? In the words of the Special Rapporteur

either military justice conforms to the principles of the proper administration of justice and becomes a form of justice like any other, or it constitutes exceptional justice, a separate system without checks or balances, which opens the door to all kinds of abuse and is justice in name only...³¹

Bearing this in mind, the Special Rapporteur suggests that there must be a process of normalizing or civilizing military justice instead of following the path of sanctification and demonization of the system.³²

The principles are not intended to be seen as an end in themselves but rather as ‘...a minimum system of universally applicable rules, leaving

Utility while Precluding Impunity’ (2008) *Journal of International Law and International Relations* Vol. 4(1) 1 for more detail about the report.

³⁰ See Gibson *Ibid* for a critical analysis of the Draft Principles.

³¹ Draft Principles para 11.

³² *Ibid*.

scope for stricter standards to be defined under domestic law.’³³ A brief analysis of only those principles which are directly relevant to this study follows.

(a) *Establishment of military tribunals by the constitution or the law*

According to this principle, ‘[m]ilitary tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.’³⁴ Although it is not entirely clear what is meant by making military tribunals an integral part of the general judicial system, this is undoubtedly one of the crucial principles for purposes of proper administration of justice through military tribunals. It addresses the legality of military justice, and not the legitimacy of the system.³⁵ In addition, it is also relevant to two areas of concern in relation to the administration of justice in the context of military tribunals. First, in some jurisdictions, military courts are organised or structured in such a way that does not give due regard to the principle of separation of powers.³⁶ In such jurisdictions, one would find no clear separation between the military justice system and the military command or the executive. This makes it possible for the military command or the executive to abuse the system in order to achieve illegitimate goals. While the military justice system exists to be used by military commanders to help them enforce military discipline in the armed forces, the system should not be abused. As explained in Chapter Four, separation between the judicial system and the executive is an important element of the principle of the separation of powers.

³³ *Ibid* para 10.

³⁴ *Ibid*, Principle No. 1.

³⁵ *Ibid* para 14.

³⁶ See for example, the study done by the ICJ (note 27 above) analysing the systems of the following countries: Peru, Switzerland, the United States of America showing that military justice system in these countries is in one way or another attached to the executive.

The second area of importance which this principle will help address is the state of affairs which prevails in military justice systems in the majority of countries—the fact that military courts are not an integral part of the general judicial system. They operate as a separate entity with little respect for the rules of natural justice and principles of judicial independence or they have no relationship with civilian courts.³⁷ Ensuring that military tribunals are an integral part of the general judicial system may be achieved in many ways. In some countries, it might require an overhaul of the relevant military justice system and a great deal of political will on the part of military commanders. It may require military commanders to relinquish, to a greater extent, the long existing autonomy of the system depending on the model chosen with respect to integration of military courts in the general judicial system.

(b) The right to be tried by a competent, independent and impartial tribunal

The above-mentioned principle requires that military tribunals be organised and operated in such a way that ensures the right of everyone to be tried by a competent, independent and impartial tribunal at every stage of legal proceedings.³⁸ This is an important principle and re-iterates the requirements of Arts 10 and 14 of the UDHR and the ICCPR respectively which guarantee everyone's right to a fair and public hearing by an independent and impartial tribunal. As the ICJ study shows, there are many jurisdictions where the above-mentioned right is not guaranteed for soldiers, and this was also the case in South Africa before the reform of the military justice system in 1999.

Furthermore, the principle also requires military judges to 'have a status guaranteeing their independence and impartiality.'³⁹ The implementation of

³⁷ This may mean that civilian courts may have no supervisory jurisdiction over military courts.

³⁸ Draft Principles, No. 13.

³⁹ *Ibid.*

this principle requires adoption of measures to guarantee the independence and impartiality of military judges.

As suggested in the introductory chapter, there are various ways of guaranteeing the independence and impartiality of military judges; and what may be suitable for one jurisdiction may not necessarily be suitable for another, but the principle remains the same. Whatever measures are adopted, the guiding principle must be guaranteeing the independence and impartiality of military courts. In elaboration of the principle under discussion, the report suggests that '[t]he statutory independence of judges vis-à-vis the military hierarchy must be strictly protected, avoiding any direct or indirect subordination...' of military judges.⁴⁰

Providing for the independence and impartiality of military judges in an enforceable legal instrument is important. It will provide an opportunity for enforcement action in the event of any deviation from the guaranteeing instrument. It is even better if such guarantees are provided for in the constitution given that the constitution would usually be the supreme law in many constitutional democracies such as that of South Africa. The independence of the general (civilian) judicial system is constitutionally guaranteed in many countries. Unfortunately, military courts do not form an integral part of the general judicial system in such countries. It is therefore almost impossible for them to benefit from the relevant constitutional guarantees on judicial independence.

(c) *Functional authority of military courts*

This principle deals with the jurisdiction of military courts regarding the offences they may deal with. It states that '[t]he jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel.'⁴¹ This principle is problematic.⁴² It fails to recognise

⁴⁰ *Ibid* para 46.

⁴¹ *Ibid*.

that there is a fine line between a military offence and a criminal offence. A soldier who commits a criminal offence offends military discipline, and should be dealt with in the military justice system concerned. The exception could perhaps be a situation where military personnel have committed serious human rights violations⁴³ or serious criminal offences such as murder involving civilians.⁴⁴ Under normal circumstances, such offences are not common in the military (at least in some countries) and the stakes relating to the commission of such offences are high to the extent that it would be appropriate for such offences to be dealt with by civilian courts.

There is also a practical point which should be mentioned regarding the principle under discussion. Soldiers commit minor criminal offences from time to time. If they are tried by civilian courts, it would become difficult for military commanders to have proper command and control over their members given that the accused will be attending trials outside military spaces.⁴⁵ In some countries, civilian court rolls are clogged and it takes a very long time to finalise trials. This may have a negative impact on military capacity and readiness. In South Africa, it is common knowledge that civilian courts are overstretched, and it would not be advisable to load them with minor criminal offences which take place in military spaces. As pointed out in Chapter Three, trial by military courts is usually speedy and efficient⁴⁶ for several reasons. For example, the level of cooperation between the defence and the prosecution is usually higher—without necessarily compromising the rights of either side; and there is easier availability of

⁴² See also Gibson (note 29 above) 37 arguing that this principle is one of the most significant areas of difficulty with the Draft Principles because there is a clear nexus between criminal offences and the maintenance of military discipline.

⁴³ As suggested in the Draft Principles, No. 9.

⁴⁴ However, Gibson is of the view that there is no principled reason to exclude certain classes of offences from the jurisdiction of military courts provided that these courts possess 'sufficient integrity, independence and impartiality to try such grave offences.' He argues, further, that military courts can be effective tools for ending impunity if organised properly (see note 29 above, 39-40).

⁴⁵ In the military world military Commanders sometimes have a role in deciding matters such as determining priority cases in the system which is usually dependent on the operational needs of military units concerned.

⁴⁶ However, one should concede that, in some jurisdictions, this happens at the expense of justice.

witnesses and many aspects crucial for the effective running of a trial are within easier reach.

Another problem which the principle under consideration is likely to create is the deepening of the thinking of non-applicability of international standards to military courts. If military courts are only confined to military offences, this will make it easier for military authorities to take advantage of interpretive gaps that exist in the UDHR and the ICCPR regarding the applicability of relevant articles of these instruments as discussed earlier.

Finally, taking away the legitimate jurisdiction of military courts contributes towards demonization of military courts, something which the report seeks to avoid.⁴⁷ As the report suggests, the correct approach is the normalization of the system, and not demonization. Normalization requires, among other things, directing energies towards ensuring that military courts enjoy sufficient guarantees for their independence and impartiality. This will potentially bring confidence regarding positive performance of military courts even when they exercise jurisdiction over minor criminal offences committed by military personnel.

For the above reasons, I agree with Gibson who argues that the principle which limits the scope of jurisdiction of military courts should be rejected.⁴⁸

(d) Review of codes of military justice

Principle No. 20 provides that '[c]odes of military justice should be subject to periodic systematic review, conducted in an independent and transparent manner.' According to Gibson, this is an excellent suggestion because it ensures that military justice systems will receive some attention in what may be crowded legislative programmes of governments.⁴⁹ Indeed, this is the case in South Africa. The envisaged Military Justice Bill has been

⁴⁷ Draft Principles para 11.

⁴⁸ See Gibson (note 29 above) 38.

⁴⁹ *Ibid* 45.

discussed and shelved several times as a result of the busy legislative schedule of the Government, among other reasons. Furthermore, another explanation of the suggested principle is that the regular review must be done 'to ensure that the authority of military tribunals corresponds to strict functional necessity, without encroaching on the jurisdiction that...belongs to ordinary civil courts'.

However, two things have to be said about the principle under discussion. This relates to the aspects which must be covered by the review process and the purpose of the envisaged reviews. The purpose for which reviews are to be conducted is narrow in that it focuses on matters of jurisdiction of military courts instead of focusing on all aspects of the system including its structure and organization.⁵⁰ In many instances, the reform of military justice systems will not be a once-off event. It will be a continuous process given the enormity of the challenges and changing circumstances. For example, Canada and the United Kingdom have embarked on the process of review of their systems on more than one occasion covering wide ranging aspects of the system. South Africa too, is in the process of overhauling its system once again. The review will focus on almost all aspects of the system. This bears testimony to the fact that military justice systems require continuous reform focusing on different aspects of the system. In the light of all these, the principle on the review of codes of military justice requires reconsideration.⁵¹

⁵⁰ See also Gibson *ibid* 46 for similar sentiments. Gibson is concerned that the commentary to the principle suggests that the primary purpose of review would be to continually narrow the scope of jurisdiction of military courts.

⁵¹ Other principles which deal with challenging aspects (in the context of international regulation of military courts) but not covered here relate to the following areas: respect for the standards of international law, jurisdiction of military courts to try civilians, conscientious objection to military service, limitations on military secrecy, military prison regime, public nature of hearings, guarantee of the rights of the defence and the right to a just and fair trial, access of victims to proceedings and non-imposition of the death penalty.

5.4 Concluding remarks

This chapter has analysed international legal instruments relating to the rights to a fair trial and to be tried by an independent and impartial tribunal. It has found that there is, in general, limited regulation of military courts in international law. However, there is evidence to suggest that international law requires military courts to be independent, irrespective of their apparent limited regulation in international law, particularly in the light of the Geneva Convention on Prisoners of War and the jurisprudence of the European Court of Human Rights and the African Commission. Of all the instruments analysed, the African Charter is better formulated in terms of its scope. On an international plane, it is easier to establish South Africa's obligation to ensure that its military courts are independent and impartial based on the African Charter. Furthermore, moves at the UN to ensure specific and universal regulation of military courts signal the need to rethink the organization of military courts in the modern age. Such moves should, in principle, be welcomed, and would hopefully steer countries towards positive reform of military justice systems the world over. As Gibson points out, these moves, however, must not forestall or discount the utility of military courts.⁵²

⁵² Gibson (note 29 above) 48.

CHAPTER 6

ASSESSING THE JUDICIAL INDEPENDENCE OF MILITARY COURTS IN SOUTH AFRICA¹

6.1 Introductory remarks

It has been established that the principle of judicial independence applies to military courts and that the South African Constitution declares all courts to be independent. However, the fact that the Constitution considers all courts to be independent does not mean that particular provisions of legislation governing the structure and functioning of the courts are immune from constitutional scrutiny.² This chapter, therefore, looks at the question whether military courts in South Africa meet the constitutional and international standards of judicial independence discussed above. It primarily measures military courts against the objective conditions of judicial independence and argues that there are a number of problem areas in this respect. Specifically, military courts will be assessed on the appointment, security of tenure and removal from office of military judges; the basic financial security of judges and aspects of institutional

¹ This chapter has benefited from my following publication: Aifheli Enos Tshivhase 'Military Courts in a Democratic South Africa: An Assessment of their Independence' (2006) 6 *New Zealand Armed Forces Law Review* 96. However, my ideas about the subject have expanded considerably since I wrote that article.

² *Van Rooyen and Others v The State and Others (General Council of the Bar South Africa Intervening)* 2002 (5) SA 246 (CC), para 22 (*Van Rooyen*). This case primarily dealt with the independence of magistrates in South Africa. The judicial independence of magistrates was challenged on several grounds. The Constitutional Court upheld some of the challenges and dismissed most of the challenges. The main challenges upheld were as follows: that the executive power to recall certain members of the Magistrates Commission was not based on an objective criteria and had to be remedied in order to avoid any perception that the power to recall permitted the Executive to exercise control over members of the Commission and that the Minister's power to exercise discipline over magistrates was inconsistent with judicial independence. However, in the context of the protection given to magistrates' courts and magistrates at an institutional level by the Constitution and by other guarantees, the relevant legislation viewed as a whole was held to be consistent with the core values of judicial independence.

independence and impartiality; and the effect of the powers of the military judicial review authority.

The chapter, does not, however, propose solutions to the problems identified. These will be dealt with in Chapter Seven.

6.2 Do South African military courts meet the basic requirements of judicial independence?

The following areas need examination in order to determine the appropriateness of the degree of independence of military courts.

6.2.1 *Appointment, security of tenure and removal of military judges - flaws at various levels*

There are fundamental concerns regarding the independence of the processes for appointment and removal of military judges as well as their security of tenure. According to s 14(1) of the Military Discipline Supplementary Measures Act 16 of 1999 (the Act or Military Discipline Act), South African military judges are first and foremost military law officers who are then assigned to the function of senior military judge or military judge.³ In practice, military law officers are appointed for terms of five or ten years which are usually renewed.⁴ This means that military judges are essentially

³ Section 14(1)(b) provides that '[t]he Minister shall *assign officers* to the functions...of senior military judges or military judge on the recommendation of the Adjutant General...' (emphasis added). To qualify for assignment, a candidate must satisfy the following requirements: be an officer of not less than a major (in the case of a court of military judge) or equivalent and in the case of a senior military judge, be an officer not below the rank of a colonel or equivalent; hold a degree in law; must also have passed a departmental course in military law; be appropriately qualified in the sense of being fit and proper person of sound character; and finally, must have three years relevant practice experience and five years in the case of a court of senior military judge. See ss 9, 10 and 14 of the Military Discipline Act in this regard.

⁴ See Michelle Nel *Sentencing Practice in Military Courts* (2012) Thesis submitted for LLD Degree, University of South Africa 196.
http://uir.unisa.ac.za/bitstream/handle/10500/5969/dissertation_nel_m.pdf?sequence=1 [accessed on 26 July 2012].

not appointed to a judicial office but are assigned to act as judicial officers.⁵ It also means that one cannot talk of the existence of a term of office for military judges but rather a period of assignment to a judicial function.

The Constitution does not speak of assignments to a judicial office. It refers to judicial appointments in all instances. For example, s 174(1) provides that ‘any appropriately qualified woman or man...may be *appointed* as a judicial officer.’ (emphasis added). There are strong indications that the use of the word ‘assign’ instead of ‘appoint’ was intended by the drafters of the Act to convey a specific message. For example, the Adjutant General (AG) and members of the Military Court of Appeals are *appointed* by the Minister.⁶ There is no talk here of ‘assignments.’

Speculatively, the choice of words in this instance may have been informed by the following factors. First, a well known saying in the military is that everyone serving in that institution is first and foremost a soldier before anything else. This is one of the slogans candidate officers hear when training to become a soldier. Alternatively, it may have been informed by the need for flexibility in the deployment of military law officers to the various functions in the system coupled with the realisation that law officers desire to advance their careers in other areas of the system than just the military judiciary. The system of short assignments fits in well with the suggested ideas.

In my view, the current system of assignments lowers the level of confidence in the military judicial office. It does not guarantee a judicial office to the person assigned to the function of a military judge. Given this set up, it may plausibly be suggested that a judicial office is not institutionalised in the military. I revert to this point in Chapter Seven.

⁵ However, the distinction between the two forms of appointment is not entirely clear since both involve entrusting a person with a particular function. This aspect is discussed in some detail in the next chapter.

⁶ See ss 27 and 7 of the Act respectively.

As noted already, the Act requires assignments to be fixed or coupled with some deployment, operation or exercise;⁷ but it does not stipulate the length of the period for which the assignment must be fixed. This means that a judicial assignment could be fixed from just a day, to one of many years, considering the open endedness of the provision. In practice, however, assignments were (initially) usually fixed for two years, but recently, the practice has been changed, and military judges are assigned for one year.⁸

Fixed-term judicial appointments are generally consistent with judicial independence, since judges need not necessarily be appointed for life.⁹ The South African Constitution supports this view as it does not prescribe the period of service for 'other judicial officers', and it does not grant a life tenure to Constitutional Court judges.¹⁰ Generally, military judges enjoy a certain degree of security of tenure because they are assigned as military judges for a determinate period; but ideally, judicial assignments must be ordinarily fixed for a longer period of time¹¹ because very short and renewable appointments are potentially problematic.¹² Nowak speaks of

⁷ Military Discipline Act, s 15.

⁸ Nel (note 4 above) 195. The system should be commended for the practice which moves away from *ad hoc* judicial appointments. It should be seen as part of the evolving process of judicial independence in the military. The Constitutional Court in South Africa sees judicial independence in this light: see *Van Rooyen & Others v The State* (note 2 above) para 146.

⁹ Manfred Nowak (ed.) *UN Covenant on Civil and Political Rights CCPR Commentary* (1993) 245. That said, fixing judicial assignments for a period of one year is obviously a regressive step, in relation to their independence. It may be worth pointing out that in *R. v. Lauzon* [1998] CMAC No. 5 para 27 (*Lauzon*) the Court Martial Appeal Court of Canada held that 'fixed terms, when protected from interference by the executive for the period of the term, met the requirements of security of tenure, and that the principle that the terms of military judges were renewable did not infringe on the required institutional independence if "the reposting process is accompanied by substantial and sufficient guarantees to ensure that the Court and the military trial judge in question are free from pressure on the part of the Executive that could influence the outcome of future decisions"'. As will be seen in Chapter Seven, the views of that Court have evolved significantly on the subject. Before *Lauzon*, there had been a number of conflicting decisions of the Court Martial in Canada on the subject.

¹⁰ Constitutional Court judges generally hold office for a non-renewable term of 12 years (s 176(1) of the Constitution) while High Court judges hold office until retirement.

¹¹ *Ibid.* See also C.J. Botha 'Jungle justice and the fundamental rights – military courts in a future constitutional dispensation' (1994) 17 *African Defence Review* 1, 4 calling for a serious consideration of security of tenure for the members of military courts in the new dispensation.

¹² See a discussion of some of the problems by the Canadian Supreme Court in *Généreux v. The Queen* [1992] 1 SCR 259. Compare a view by Nel (note 4 above) 199-202, 490 that the tenure of South African '...military judges does not lie in their assignment as military judge, but rather in their appointment as military law officers and would therefore comply with the

fixing judicial appointments for at least several years.¹³ In *Incal v Turkey* the European Court of Human Rights (ECHR) expressed concerns about the independence of the Turkish National Security Court on the basis that the court was composed, among others, of a military judge whose tenure was only for a four-year renewable term.¹⁴ As already discussed, the possibility of a judicial officer working for the renewal of his or her term instead of administering justice cannot be ruled out. In the Canadian case of *Généreux v The Queen* Stevenson J summed it up when he stated that '[a]s the tenured term draws to a close, military judges may wish to secure a re-appointment or to advance their careers in some other respect. It would thus be in the interest of these judges to please the 'executive.'¹⁵

Currently, the Act does not make provision for renewal of judicial assignments. Strictly speaking, it could be argued that there are no renewals under the Act but rather re-assignments which take place on the recommendation of the AG in the context of s 14 of the Act. Re-assignments are done frequently (usually every two years or every year) because judicial assignments are fixed for short periods of time. It has become common practice to offer military judicial re-assignments to the incumbents. This

requirement of security of tenure.' With respect, this is a misconception of the requirement of security of tenure for judicial officers because security of tenure cannot be guaranteed by the incumbents' continued holding of another office which is not a judicial office. The relevant principles and authorities on the subject do not support the view proffered by Nel above. In any event, as it will be shown further below, fixed renewable terms of office are problematic and constitutionally questionable in the light of a recent ruling of the Constitutional Court in *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 CC, already discussed in Chapter Four.

¹³ Nowak (note 9 above).

¹⁴ European Court of Human Rights case of *Incal v. Turkey* [1998] ECHR 48. Following the reasoning in *Incal*, amongst others, M Carnelley 'The South African Military Court System – Independent, Impartial and Constitutional?' (2005) 33(2) *Scietia Militaria: South African Journal of Military Studies* 55, 67 suggested that the 'South African military judicial system may not be regarded as independent, as the appointments are not permanent but for fixed periods or coupled with specific operations.' With respect, this suggestion is incorrect because fixed judicial appointments do not necessarily undermine judicial independence unless they are renewable, a factor which Carnelley does not refer to in her observation. Moreover, Constitutional Court judges are appointed for a fixed and non-renewable term.

¹⁵ [1992] 1 SCR 259, 317. This case dealt with the question whether a General Court Martial is an independent and impartial tribunal for the purposes of s 11(d) of the Canadian Charter of Rights and Freedoms. The majority held that the General Court Martial was not independent because it did not meet the essential conditions of judicial independence set in *R v Valente* (1985) 24 DLR (4th) 161 (SCC). This case primarily dealt with the question of whether or not the Provincial Court (Criminal Division) was independent within the meaning of s. 11(d) of the Canadian Charter of Rights and Freedoms.

practice, coupled with public opinion, may serve as an effective restraint upon executive action which may interfere with judicial independence.¹⁶ However, it is not by itself sufficient to safeguard judicial independence as it cannot supply essential conditions of independence.¹⁷ Moreover, public opinion hardly focuses on the affairs of the military justice system for various reasons. For example, many aspects of the system are not open to public scrutiny.¹⁸ It is for that reason that calls for specific legislative guarantees of judicial independence are in order.

Furthermore, the status of the AG is worrying in the context of re-assignments. The AG is appointed by the Minister of Defence,¹⁹ and is responsible, among other things, for the overall management of the military justice system and military legal services.²⁰ This officer does not seem to be protected from executive and command interference compared to other officers such as military judges.²¹ Although the AG occupies a unique position with no civilian equivalents, he or she is more or less part of the executive in the light of the fact that he or she is responsible to the Minister and exercises certain functions under the control of the Minister.²²

¹⁶ *R v Valente* *ibid* para 36.

¹⁷ *Ibid*.

¹⁸ However, it must be pointed out that with the dawn of democracy in South Africa, the military is beginning to open up to public scrutiny. For example, military court proceedings are now open to members of the public although it must be pointed out that most members of the public are not aware of such courts.

¹⁹ Section 27 of the Military Discipline Act.

²⁰ Section 28 of the Act. However, in 2006, the Minister of Defence created a civilian post of Chief Defence Legal Services (CDLS) whose powers appear to be in conflict with that of the AG because the former exercises overall control of the Military Legal Services Division, which includes the military justice system. While one values civilian oversight over the military justice system, the creation of the post of CDLS without amending the relevant Act is probably illegal. It is possible that in creating the post in question, the Minister relied on s 202(2) of the Constitution which provides that '[command] of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence.' It is not entirely clear whether the power conferred on the relevant Minister in that provision can be used as a basis to over-step legislation enacted validly by Parliament as this raises the question of rule of law. For a discussion on the tension resulting from the creation of the CDLS's post, see *Information Bulletin, Defence Legal Services Division* Vol. 4 Issue 5 (2008), 2 <http://www.dlsdiv.mil.za/infobulletins/Info%20Bulletin%20October%202008.pdf> (accessed 13 July 2012).

²¹ See s 28(1)(b) which requires the AG to 'submit to the Minister a written report on all his or her functions during that year.'

²² For example, the AG is empowered in terms of s 14(3) to assign officers to certain functions but under the control of the Minister.

If the AG does not recommend a further assignment, that could be the end of the incumbent's military judicial career. It is not entirely clear what criteria are used to decide whether a re-assignment should be offered to officers with a judicial track record since the Act does not make provision for renewals.²³ As a result, there is no objective guarantee that the career of a military judge would not be affected by decisions tending in favour of an accused rather than the prosecution. This system does not ensure that the appointment of military judicial officers takes place without favour and prejudice as required in the terms of s 174(7) of the South African Constitution. Although the powers exercised by the AG and the Minister regarding judicial assignments are subject to constitutional control, the current system requires some improvement for it to be more in line with s 174(7) of the Constitution. It is proposed that the arrangement discussed above leads to a reasonable perception that military judges are not independent from the AG and the Minister of Defence both of whom are part of the executive. This does not impugn the personal integrity of the serving AG or that of the Minister of Defence. Both may well be persons of highest integrity but that does not guarantee that the independence of incumbent judges will not be affected by their potential decisions.

Turning to removal from office, the requirement for security of tenure is, among other things, that the decision-maker must be removable only for a just cause and be secure against interference by the executive or other appointing authority.²⁴ In *Van Rooyen*, it was held that 'protection against removal from office lies at the heart of judicial independence.'²⁵ South African military judges may be removed by the Minister of Defence on the recommendation of the AG. He or she may recommend the removal of any military judge for reasons of incapacity, incompetence or misconduct, or at

²³ Presumably, the AG is guided by s 14(2) which provides that '[t]he Adjutant General shall not recommend any officer for assignment to any function...unless, upon due and diligent enquiry, the Adjutant General is convinced that the officer is a fit and proper person of sound character who meets the requirements prescribed in this Act for such assignment.' This is the same provision that guides new judicial assignments.

²⁴ *De Lange v Smuts & Others* 1998 (3) SA 785 (CC) para 70 (constitutionality of s 66(3) of the Insolvency Act 24 (1936)).

²⁵ Note 2 above para 161.

the request of the judge concerned.²⁶ These grounds are similar to the grounds of removal for superior court judges and those in the *UN Principles on Judicial Independence*²⁷ except that in the case of high court judges, the incompetence or misconduct must be gross.²⁸ Section 17 of the Act clearly meets the requirement that judicial officers be removed for just cause only.

The problem, however, lies in two areas. The first relates to the lack of procedure for removal, and the functionaries involved in the process of removal of military judges. In *Van Rooyen*, the Constitutional Court stated that '[t]he Minister, a member of the government, should not have the power to exercise discipline over judicial officers and to punish them for misconduct. That would place the judicial officers concerned in a subordinate position in relation to the government which is inconsistent with judicial independence.'²⁹ As things stand, military judges are put in a subordinate position in relation to the Minister of Defence regarding discipline.

In addition, the *UN Principles on Judicial Independence* (UN Principles) require that a complaint made against a judicial officer in his or her professional capacity should be dealt with swiftly, fairly and under appropriate procedure. Of paramount importance is that the judicial officer must have the right to a fair hearing.³⁰ All proceedings concerning discipline, removal or suspension of judicial officers must be subject to independent review except where such decisions are made by the highest court or legislature in impeachment or similar proceedings.³¹

The current mechanism for the removal of military judges is problematic. A finding as to whether or not a military judge is guilty of misconduct should be made by a judicial officer, and not by a member of the executive

²⁶ Military Discipline Act, s 17.

²⁷ *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

²⁸ Section 177(1) of the Constitution.

²⁹ *Van Rooyen v The State* (note 2 above) para 179.

³⁰ *UN Principles* (note 27 above).

³¹ *Ibid.*

branch of the government or the military command.³² The procedure for the investigation relating to the conduct in question ought to be conducted in a manner consistent with natural justice.³³

6.2.2 Basic degree of financial security of military judges

Judicial officers must have a basic degree of financial security.³⁴ In relation to the position of magistrates, the Constitutional Court has indicated that it is unclear whether it should be the executive or the legislature to determine what is meant by basic financial security.³⁵ The Court acknowledged that this is a difficult area for which there are no easy solutions.³⁶

As discussed in Chapter Four, the Constitutional Court grappled with financial security in the context of magistrates in *Van Rooyen*³⁷ where the Court established that basic financial security entails (a) adequate remuneration;³⁸ (b) safeguards to avoid arbitrary reduction of salaries of judicial officers;³⁹ and (c) an assurance that judicial officers should not be put in a position to engage in negotiations with the executive over their salaries because they are not employees and cannot resort to industrial action to advance their interests in their conditions of service.⁴⁰

Unlike in the case of High Court judges and magistrates, there is no special dispensation for determining salaries and benefits for military judges. As will be discussed further below, these judges are not adequately

³² The Constitutional Court supports this approach in *Van Rooyen v The State* (note 2 above) para 195 when it states the following in relation to magistrates: ‘...the person charged with the responsibility of making a finding as to whether or not the magistrate concerned has been guilty of misconduct, should be a judicial officer. It is not consistent with judicial independence that a person other than a judicial officer should be charged with this responsibility.’

³³ *Ibid* para 196.

³⁴ *De Lange v Smuts* (note 24 above) para 70. The 2004 Ministerial Task Team Report did not address financial security of military judges.

³⁵ *Van Rooyen v The State* (note 2 above) para 138.

³⁶ *Ibid*.

³⁷ *Ibid*.

³⁸ *Ibid*.

³⁹ *Ibid* para 149.

⁴⁰ *Ibid* para 139.

remunerated except those who have been in service for a very long period of time who receive better remuneration on the basis of their experience and performance. This can be discerned from the Occupation Specific Dispensation for military law practitioners (OSD MLP) adopted in 2009.⁴¹ According to the OSD MLP, the same scale that applies to military prosecutors or defence counsel is also applicable to military judges. That on its own may not necessarily be a problem. The issue is the adequacy of the remuneration provided for in the OSD MLP. The key features of the OSD MLP are experience, qualifications, and consistent above average performance of the military law officer concerned.

According to the OSD MLP salary grades for the 2011 financial year, a military judge with legal experience of between three (minimum required) and ten years earns between R188, 736⁴² and R309, 216 per annum depending on the exact years of service and experience, qualifications, and performance. In contrast, an entry level magistrate earns R671, 219.⁴³ In the next chapter, I argue that magistrates provide an appropriate comparator for military judges. To illustrate another possible scenario, a senior military judge with legal experience of between 11 and 13 years earns between R434,451 and R527,232 per annum (all inclusive package) in comparison with a total remuneration package of R738, 262 earned by a senior magistrate.⁴⁴ The most experienced judge (30 years and more) with appropriate qualifications coupled with satisfactory performance will earn up to R910,518 per annum.

⁴¹ On file with the author.

⁴² For comparison purposes, it is an equivalent of about \$23.592 per annum. At this level, the package is not all inclusive—meaning that it excludes benefits such as medical aid and housing allowance. These are difficult to quantify, suffice to say that the military offers the most generous medical benefits than any State department. The current (2012-2014) housing allowance for public servants is R900 per month.

⁴³ See Proclamation 54 of 23 September 2011 made in terms of the Magistrates' Act No. 90 of 1993. This amount is a total remuneration package—in other words there are no benefits over and above that amount. For comparison purposes, it is an equivalent of about \$83, 902, 375. I revert back to this point in the next chapter. The accuracy of the figures presented here may be disputed given the varied nature of the application of the OSD MLP in relation to specific individuals. However, the range is generally accurate in terms of the OSD MLP on file with the author.

⁴⁴ See Proclamation *ibid*.

The remuneration of military judges described above is inadequate; especially in the lower to mid-level (from three to ten years of experience).⁴⁵ Furthermore, it is glaringly lower when compared with similar judicial officers in the civilian setting. Inadequate remuneration opens up judges to influences such as corruption.⁴⁶ It also affects their independence as individuals because the inadequacy of remuneration forces them to perform in a way that will get them to the next higher notch instead of focussing on administering justice as they see fit. I make this point because military law officers' (military judges included) advancement to the next salary notch is dependent on their performance or promotion. Military judges can hardly be perceived to be independent in such conditions.

In the current set up military judges are public servants.⁴⁷ Prior to 2004, the salaries of soldiers, including military judges, were determined in accordance with the Public Service Act. This situation has been altered by the Defence Act of 2002.⁴⁸ Salaries of military personnel are now determined by the Military Bargaining Council (MBC), failing which by the Minister of Defence taking into account recommendations of the recently established Defence Force Commission but with the approval of the Minister of Finance.⁴⁹ In the recent past, the MBC has failed to resolve many of the disputes between the SANDF and the military trade unions concerning transformation and conditions of service of soldiers. Some of the matters

⁴⁵ Compare, however, the view of Nel (note 4 above) 202 that '...the salaries and benefits of military judges are *sufficiently protected and governed* by legislation and policy documents...' (emphasis added). While one accepts that there is legislation and policy dealing with salaries of military law officers in general, Nel does not pay sufficient attention to the 'adequacy' of remuneration as one of the crucial elements of financial security as stated by the Constitutional Court in *Van Rooyen* (note 2 above) para 138. She compares military law officers with other ordinary military officers in the SANDF. I argue in Chapter Seven that military judges should be compared with their peers in the civilian setting to ensure appropriate recognition of their status.

⁴⁶ However, to date, the author is not aware of a single case of corruption involving military judges.

⁴⁷ Public Service Act, 1994 (Proclamation No. 103 of 1994), s 8 read with s 1 classifies the Permanent Force of the South African National Defence Force as part of the public service.

⁴⁸ Defence Act 2002. However, the SANDF is still part of the public service although the conditions of service of military personnel are now extensively regulated by the new Defence Act.

⁴⁹ Defence Act 2002, s 55. The Defence Force Commission deals with conditions of service of all military personnel.

ended in the Constitutional Court and more recently soldiers have engaged in industrial action.⁵⁰

Although the extent to which the above scenario has affected military judges is unclear, it is inconsistent with judicial independence for military judges to be caught up in the situation described above.⁵¹ The remuneration arrangement described above is not suitable for judicial officers. It ignores the status of military judges as judicial officers and this is inconsistent with the *UN Principles* which require that the law should secure adequate remuneration and conditions of service for judicial officers.⁵² Section 165 of the Constitution read with the *UN Principles* presuppose the adoption of special measures which ensure basic financial security for judicial officers.⁵³

As argued in Chapter Two, military courts are part of the South African judicial system and must be treated as such. While one acknowledges the uniqueness of the relationship between the military and its members, there is no military imperative which justifies the disregard of basic financial security of military judicial officers. In any event, the Constitutional Court has stated that judicial independence is a principle and a norm that went beyond and lay outside of the Bill of Rights and therefore not subject to the limitation clause.⁵⁴ This means that non-compliance with the basic conditions of judicial independence cannot be justified. Measures must be adopted to address financial security of military judges in such a way that their financial packages are appropriately determined and adequate.

⁵⁰ *SANDU v Minister of Defence and Others* 2007 (5) SA 400 for an account of some of the events on this issue.

⁵¹ See *Van Rooyen v The State* (note 2 above) para 139 for remarks which support this view.

⁵² Note 27 above.

⁵³ In *Van Rooyen v The State* (note 2 above) para 148, the Constitutional Court held that salaries of magistrates must be determined in accordance with s 165 of the Constitution and that the power to determine such salaries is subject to constitutional control.

⁵⁴ *Ibid* para 35.

6.2.3 *Institutional independence and impartiality of military courts*⁵⁵

Judicial independence is not satisfied if an individual judge enjoys basic conditions of judicial independence but the court or tribunal over which he or she presides is not independent of the other branches of government.⁵⁶ As discussed in Chapter Four, one of the essential conditions of judicial independence is the tribunal's institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function and judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.⁵⁷ Institutional independence protects judges as a collective.⁵⁸

The Constitutional Court has stated that structural independence proclaimed in s 165 of the Constitution is an indispensable part of judicial independence.⁵⁹ That section provides, among other things, that '[n]o person or organ of state may interfere with the functioning of the courts.' In the process of discussing institutional independence in *Valente*, the Supreme Court of Canada drew a distinction between adjudicative independence and administrative independence.⁶⁰

Military judges seem to enjoy reasonably sufficient guarantees for institutional independence with respect to adjudicative aspects. Complete freedom to make judicial decisions is probably the ultimate criterion of judicial independence. The Military Discipline Act declares that military judges are independent and subject only to the Constitution and the law.⁶¹

⁵⁵ Independence and impartiality are jointly discussed here because the two are closely linked and often referred to together in many legal instruments (including the South African Constitution) and some judicial precedents.

⁵⁶ *R v Valente* (note 15 above) para 20. While this distinction might be helpful, there is a fine line between the two.

⁵⁷ *De Lange v Smuts* (note 24 above) para 70.

⁵⁸ J Franco & C Powell 'The Meaning of Institutional Independence in *Van Rooyen v The State*' (2004) 121(4) *SALJ* 562, 564.

⁵⁹ *De Lange v Smuts* (note 24 above) para 59.

⁶⁰ *R v Valente* (note 15 above) para 47.

⁶¹ Military Discipline Act, s 19(a).

In addition, s 14(4) of the same Act provides that officers and members assigned shall perform their functions free from executive or command interference. This means that military judges must be free from the military command and the executive in the exercise of their judicial function. Read together, it can be argued that ss 14 and 19 of the Military Discipline Act entrench, to a large degree, the institutional independence of military courts in relation to adjudicative aspects.

Attention now turns to the administrative independence of military courts. Assignment of judges, sittings of the court, allocation of court rooms and direction of administrative staff engaged in carrying these functions are generally considered the minimum requirement for institutional independence.⁶² This is often a highly contested area between the courts and the executive. Who performs the functions described above with respect to military courts in South Africa?

The above matters are largely governed in terms of ss 28(1)(a) and 32(2) of the Act. Section 28(1)(a) provides, among other things, that '[t]he Adjutant General shall - be responsible for the overall management, promotion, facilitation and co-ordination of activities in order to ensure the effective administration of military justice and the military legal services...'. This provision effectively means that, administratively, the AG sits at the apex of the military justice system in all respects. This is because the words 'overall management, promotion, facilitation and co-ordination' are broad enough to encompass almost everything one can think of, at least administratively.⁶³ That said, s 32(2) of the Act brings another dimension with respect to the availability and scheduling of military judges. It provides that '[t]he local representative of the AG shall, in consultation with the Director: Military Judges or the military judges in question, as the case may be, *plan and schedule the availability of military judges and military assessors* within his

⁶² See *R v Valente* (note 15 above) para 49.

⁶³ Moreover, in terms of s 7(6) of the Act the AG determines which particular case or classes of cases are to be brought before which Court of Military Appeals as the Minister may appoint more than one such Court at a time.

or her area or field of responsibility' (emphasis added). This provision suggests that the planning and scheduling of military judges is shared (at least to some extent) between the AG and military judges concerned.

Does the above arrangement amount to interference with the functioning of the courts in the context of s 165(3) of the Constitution given that military judges have no overall control over any administrative aspects of military courts? Is this arrangement consistent with judicial independence? These are difficult questions to answer conclusively. In my view, the answers to the questions depend on whether the phrase 'functioning of the courts' is given a narrow or broader interpretation.

If the phrase 'functioning of the courts' is given a narrow interpretation, it could mean functioning of the courts in relation to pure judicial decision making. A broader interpretation would also include certain administrative aspects concerning the functioning of military courts. It is proposed that the latter is the correct interpretation of that provision because it furthers the independence of the courts while the former may impact negatively on the structural independence of the courts. The functioning of the courts includes the day to day administration of such courts. It is not, however, contended that other structures of the military have no role to play in the administration of military courts. In fact, the Constitution requires 'organs of state' to assist the courts⁶⁴ but this assistance must support the independence of the courts.⁶⁵ Any assistance that is inconsistent with judicial independence amounts to interference with the courts. In the circumstances, it is contended that military courts do not enjoy institutional independence on the administrative aspects because military judges do not have overall-control of the day to day running of military courts.

Attention now turns to the impartiality of military courts. Section 165(2) of the Constitution requires all courts to apply the law impartially and

⁶⁴ See s 165(4).

⁶⁵ *Ibid.*

without fear, favour or prejudice. In the context of military courts, this constitutional requirement is brought home through s 19 of the Act. This provision, like the Constitution, requires military judges to be impartial in the exercise of their functions.

A strong institutional link exists between military judges and the Defence Force. This is by virtue of military judges being active members of that institution. They serve in military uniform, carry a military rank, are subject to the military discipline code, and share the values of the service community. Admittedly, there is nothing wrong in sharing the values of the service community. What matters is that military judges should be in a position to '[p]ut aside any prejudices they may have and act and be seen to act independently and impartially in deciding the issues in the case before them.'⁶⁶

The fact that military judges are also officers serving in the Defence Force raises questions about their impartiality. On the basis of this attachment, military judges could be understood to be affiliated to one of the litigants in military court proceedings and be exposed to institutional bias. It has been pointed out that 'the impartiality of the judge corresponds to the equality of the parties.'⁶⁷ Both the military and the offending soldier should generally be treated equally by a military judge. On a similar note, the Constitutional Court has stated that 'access to courts that function fairly and in public is a basic right.'⁶⁸ The Court added that the impartiality of judicial officers is an essential requirement of a constitutional democracy and is closely linked to the independence of courts.⁶⁹

⁶⁶ *R v Boyd* (2002) UKHL 31, para 57. This case dealt, among other things, with the question whether the British courts-martial created in 1996 lacked independence and in violation of Art 6(1) of the European Convention of Human Rights. The House of Lords held that the courts-martial in question were objectively independent and impartial because they were safeguards built into the system. The judgment of the House of Lords was largely confirmed by the European Court of Human Rights in *Cooper v The United Kingdom* (2003) ECHR 686.

⁶⁷ L Lehtimaja & M Pellonpää 'Article 10', in Afredsson and Eide (eds.) (1999) *The Universal Declaration of Human Rights: A Common Standard of Achievement* 228.

⁶⁸ *S v Basson* 2005 (1) SA 171 (CC) para 23.

⁶⁹ *Ibid* para 24.

Impartiality connotes the absence of bias, actual or perceived. According to Fawcett, impartiality is ‘...absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice.’⁷⁰ This relates to an internal or subjective facet of independence. In South Africa, the legal test for impartiality is one of reasonable apprehension of bias, as established in *South African Rugby Football Union and Others v President of the Republic of South Africa*⁷¹ as discussed in Chapter Four. This test was also referred to in *S v Basson*:⁷²

The question is whether a reasonable, objective and informed person would on correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour.

The above test suggests that the answer to the question would depend on the circumstances surrounding a particular judge or tribunal coupled with the oath of office taken by the judge. Similarly, *Findlay v The United Kingdom* (*Findlay*) refers to two aspects of impartiality.⁷³ Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must be impartial from an objective point of view in that it must offer sufficient guarantees to exclude any legitimate doubt of impartiality.⁷⁴ In *Cooper v The United Kingdom* (*Cooper*), the European Court of Human Rights reiterated its holding in *Findlay v The United Kingdom* that the standpoint of the accused is important without being decisive in deciding whether a particular court lacks independence and impartiality.⁷⁵ Instead, what is decisive is whether the doubts of the accused are objectively justified.⁷⁶

⁷⁰ Referred to in *R v Valente* (note 15) para 16.

⁷¹ 1999 (4) SA 147 (CC).

⁷² *S v Basson* (note 68 above) para 25.

⁷³ *Findlay v The United Kingdom* (1997) ECHR 8, para 73. This case is particularly important because it dealt with the independence and impartiality in the context of military courts and was cited with approval in *Freedom of Expression Institute and Others v President, Ordinary Court Martial and Others* 1999 (2) SA 471 (C) para 27.

⁷⁴ *Findlay v The United Kingdom* *Ibid* para 73.

⁷⁵ *Cooper v The United Kingdom* (note 66 above) para 104. Like *Findlay v The United Kingdom*, this case is also an important authority on the subject of judicial independence of

Applying the test, the Court held that since all the members of the court-martial which decided *Findlay*'s case were subordinate in rank to the convening officer and fell within his chain of command, Findlay's doubts about the tribunal's independence and impartiality could be objectively justified.⁷⁷ Although South African military judges fall within the general command of the AG, the South African military court system is not actually exposed to the complaints raised in *Findlay v The United Kingdom* for two reasons. Firstly, military judges do not fall under the chain of general military command nor the command of the AG in the exercise of their judicial function in so far as this relates to deciding cases that come before them. This means that the general military command cannot lawfully interfere (at least directly) with the judicial decision making of military judges. Secondly, subsequent to *Freedom of Expression Institute and Others*

military courts because it dealt with the question whether the British courts-martial in the Royal Air Force created post *Findlay* were independent and impartial in the context of Art 6(1) of the European Convention on Human Rights. This time, the European Court held that the British courts-martial convened in the Royal Air Force had sufficient safeguards to ensure their independence and impartiality mainly because of the presence of a Judge Advocate (a legally qualified *civilian* appointed by the Lord Chancellor (also a civilian) who possessed qualifications and played a pivotal role in the proceedings of a court-martial. See *Cooper* paras 117, 121-123, and 126. This confirms the idea that having civilians on military courts enhances the judicial independence of such courts. In another (important) case decided at the same time as *Cooper*, this time concerning courts-martial in the Royal Navy (*Grievés v The United Kingdom* (2004) 39 EHRR) (*Grievés*), the same Court also emphasised the value added by civilians on courts-martial with regard to judicial independence. It found the court-martial convened by the Navy to be in violation of Art. 6(1) of the Convention mainly because the position of the Judge Advocate (JA) (a serving officer in the Royal Navy) contrasted with the Judge Advocate for courts-martial in the Air Force did not constitute a strong guarantee of the independence of a naval court-martial. The following factors weighed heavily with the Court: that the JA was a serving naval officer in a post which may or may not be a legal one and who sits in courts-martial only from time to time; there were certain reporting practices at the relevant time which could result in a situation where the Judge Advocate Fleet could pass comments about the JA's court-martial performance to the Chief Naval Judge Advocate, a Naval officer answerable to the senior Admiral responsible for personnel planning or whose report could be forwarded to the JA's reporting officer.

However, I do not read the jurisprudence of the European Court of Human Rights to be suggesting that having military personnel serving as military judges is on its own, without more, problematic. What matters is whether sufficient safeguards exist to guarantee the independence of military courts. In both *Findlay* and *Grievés* the Court answered the question in the negative for reasons already discussed.

As will be argued in Chapter Seven, this may be achieved in a variety of ways and civilianisation (partial or full) could very well be an option for some countries as observed in the UK and New Zealand.

⁷⁶ *Cooper v The United Kingdom* (note 66 above) para 104.

⁷⁷ *Findlay v The United Kingdom* (note 73 above) para 76.

v President, Ordinary Court Martial, and Others,⁷⁸ (*Freedom of Expression*) South Africa abolished a system of ‘convening authority’ where courts-martial were convened on an *ad hoc* basis by such authorities. The system now comprises full-time permanent military courts.

However, a question could be raised as to whether these courts present an appearance of impartiality and independence on the basis that judges of these courts are members of the Defence Force and that there are numerous concerns about their independence discussed in this chapter. A tribunal must present an appearance of independence.⁷⁹ Considering the attachment of military judges to the Defence Force, the fact that they have no overall control over administrative affairs of military courts, and their lack of basic financial security and security of tenure, a reasonable, objective and informed person would reasonably apprehend that a military judge may not bring an impartial mind to bear on the adjudication of military cases.⁸⁰ Guarantees are required to exclude legitimate doubts of impartiality and independence. The institutional independence on the adjudicative aspects currently enjoyed by military courts must be supported by other essential conditions of judicial independence because factors outside judicial decision making do impact on judicial independence of a judicial officer.

Many of the judges in the military may actually be impartial and their integrity of the highest order, but it is not only actual impartiality which matters. The perception of the impartiality of a judicial officer is crucial in the administration of justice.⁸¹ The importance of impartiality and independence was also illustrated in *R v Valente* which was referred to with approval by the Constitutional Court in *De Lange v Smuts*.⁸²

⁷⁸ Note 73 above.

⁷⁹ *Findlay v The United Kingdom* (note 73 above) para 73.

⁸⁰ See the European Court case of *Incal v Turkey* (note 14 above) paras 72-73 in general support of this proposition.

⁸¹ *S v Basson* (note 68 above) para 27.

⁸² *De Lange v Smuts* (note 24 above) para 71, the Court stated that: ‘[b]oth independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its

The following *dictum* by Corbett CJ in *Mönnig v Council of Review* (*Mönnig*) further illustrates the problem of apprehension of institutional bias in the military justice system:⁸³

[o]ne can theoretically conceive of a case where the Defence Force in response to orders from 'the top' undertakes an operation the legality of which is highly controversial; and a member of the Defence Force is charged with having disobeyed an order to participate in the operation. It may well be that in such a case the apprehension of institutional bias would be a reasonable one and that in the interests of justice the case should be heard in a civil court, not a military one.

The reasoning of the Appellate Division (as then styled) in this case suggests that in some cases involving the Defence Force there may be grounds for reasonable apprehension of institutional bias against military judges as was the position in that case.

Let us now consider the oath of office of military judges and its effect on the status of military courts. It reads as follows:

I...swear that, as (a military judge), I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law of the Republic of South Africa, and will perform my duties to the best of my ability. So help me God.

Undoubtedly, this is an oath of office which strongly affirms judicial independence. It does not, however, save military courts from the appearance that they may not be impartial and independent considering the numerous problems discussed above. A strong oath of office must be reinforced with basic requirements of judicial independence discussed in Chapter Four. The oath does not, without more, deliver the basic requirements of independence and impartiality.

effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.'

⁸³ (1992) 3 SA 482 (A) 493.

6.2.4 *The system of military judicial review and its effect on the functioning, status and dignity of military courts*

Section 165 (4) and (5) of the Constitution provide that

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

As noted in Chapter Two, persons convicted and sentenced by a military court have the right to automatic, speedy and competent review of the proceedings.⁸⁴ Every acquittal or discharge of an accused is final but every finding of guilty, any sentence imposed and every order made by a military court are subject to a process of review by the military review authority which is composed of persons who are not judicial officers.

One of the difficulties is that the review authority exercises enormous judicial power despite the fact that it is not a court of law. As already pointed out, the review authority may uphold, vary or substitute a sentence or refuse to uphold a finding and set the sentence and/or finding of a military court aside.⁸⁵ Moreover, the military review authority may direct a military court to give written reasons for any ruling or finding.⁸⁶ The finding of the review authority is deemed to be the finding of the court which passed the original sentence or made the original finding or order.⁸⁷

Review of decisions of military courts by a non-judicial authority is not unique to South Africa. It is a common feature in a number of jurisdictions including Namibia and Zimbabwe. In *Cooper*, the military review authority of the United Kingdom was challenged.⁸⁸ The Court did acknowledge that the reviewing authority was an anomalous feature of the British court-martial

⁸⁴ Military Discipline Act, s 25.

⁸⁵ Military Discipline Act, s 8(1).

⁸⁶ *Ibid* s 107.

⁸⁷ *Ibid* s 107.

⁸⁸ *Cooper v The United Kingdom* (note 66 above) 686.

system and added that it would express its concern about a criminal procedure which empowers a non-judicial authority to interfere with judicial findings.⁸⁹ It is argued that aspects of the current system of review are unconstitutional because they amount to interference with the functioning of the courts and affect negatively the dignity of military courts.⁹⁰ These review powers mean that orders or decisions issued by military courts are not binding until they are confirmed by the review authority. This is in contravention of s 165(5) of the Constitution which provides that '[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies.'⁹¹ This means that a court decision is binding unless it is overturned by another competent court.

In *Cooper v The United Kingdom*,⁹² however, the Court held that the role of the Reviewing Authority did not undermine the independence or impartiality of the court-martial mainly because the final decision in court-martial proceedings will always lie with a judicial authority. This is indeed the case where the right of appeal is exercised; but the reasoning of the European Court is problematic because it relies on appeal procedures in order to remedy a serious anomaly in the system. A decision of a court-martial where the right of appeal to the appeal court has not been exercised will be compromised by a non-judicial body.

⁸⁹ *Ibid* para 130.

⁹⁰ However, there is precedent which suggests that the powers exercised by similar military review authorities are not problematic. For example, see a precedent emanating from Lesotho in *Sekoati and Others v President of the Court Martial and Others* 2000 (12) BCLR 1373 (LesCm). This case dealt with the question whether the court-martial in Lesotho was independent and impartial in the context of the Constitution of that country. The Court stumbled with the question but in the end concluded that the Constitution did not require courts martial to be independent but also stated that, in any event, the courts were actually independent. With respect to the military review authority of Lesotho, the Court could not see how a subsequent review could be regarded as interference in the proceedings which had terminated. On appeal, the Court of Appeal of Lesotho reached similar conclusions in *Sekoati and Others v President of the Court Martial and Others* 2001 (7) BCLR 750 (Les). There was a great deal of constitutional argument, germane to the Constitution of Lesotho, which the two courts basically relied on for their conclusions. I will not go into the arguments here because they are not applicable to South African military courts as our Constitution and jurisprudence do not provide room for such arguments to be made.

⁹¹ In *Freedom of Expression* (note 73 above) para 11 reached a similar conclusion but evaluating a different legislative scheme – at the time, decisions of courts-martial were reviewed by the Convening Authority. Both the current and former schemes involve the same principle- a non-court entity interfering with court decisions.

⁹² Note 66 above.

Even if it were correct to argue that the role of the reviewing authority does not compromise the independence or impartiality of a court-martial, it nevertheless affects negatively the dignity of a military court, at least in the context of South Africa where the Constitution requires the dignity of the courts to be protected. In a separate concurring opinion in *Cooper v The United Kingdom*, Costa J summed up the issue when he stated that 'I still think that the intervention of the Reviewing Authority is anomalous, unfortunate and archaic and that it would be desirable to put an end to the practice.'⁹³ It is therefore not surprising to note that the United Kingdom's new Armed Forces Act of 2006 departs from the practice of reviewing decisions of courts-martial by an institution which is not a court of law.

While the value of automatic reviews must be acknowledged, the objective should not be achieved through means that compromise the judicial independence and dignity of military courts. The varying of court decisions by an authority which is not a court of law amounts to interference with the functioning of the courts. Furthermore, the State, through the current arrangement of the military review authority, acts contrary to its constitutional obligation which requires that it adopts measures that assist and protect the courts to ensure, among other things, the 'dignity' of courts. There is therefore a need to investigate appropriate options which retain the benefits of the current review system without tainting the independence and dignity of the courts. In the next chapter, I briefly discuss some of the options.

⁹³ *Ibid*, Costa J concurring opinion.

6.2.5 *The Constitutional Court's approach to judicial independence of lower courts: The possible role of the Military Court of Appeals*

As discussed in Chapter Four, the Constitutional Court has followed a controversial approach to the independence of lower courts. In *Van Rooyen*⁹⁴ the Court accepted a lower standard of judicial independence in relation to magistrates' courts than is required of the High Courts. To recap, it did this for several reasons: (a) that the Constitution provided for a hierarchy of courts and in its view this justified the different degrees of independence;⁹⁵ (b) that higher courts deal with matters which were seen to be 'the most sensitive areas of tension between the Legislature, the Executive and the Judiciary';⁹⁶ and (c) that the increased level of institutional independence at the higher level was justified because the High Courts are in themselves a means of ensuring and guarding the independence of lower courts through the mechanism of judicial review.⁹⁷

The central argument of the Constitutional Court suggests that judicial review is the remedy by which the lowered standard of independence is justified.⁹⁸ As pointed out already, this would mean that the remedy to the lower standard of independence of military courts is judicial review by the Court of Military Appeals (CMA) and possibly higher civilian courts on certain matters.⁹⁹ While it is possible to agree with the essence of the Constitutional Court's approach pertaining to the hierarchical nature of judicial independence of the courts established by the Constitution, the

⁹⁴ *Van Rooyen v The State* (note 2 above).

⁹⁵ *Ibid* para 28.

⁹⁶ *Ibid* para 25.

⁹⁷ *Ibid* paras 21-24.

⁹⁸ The Constitutional Court's approach has been criticized by Franco & Powell (note 58 above) 575 for two reasons: Firstly, that judicial review is not a unique protective mechanism. It is rather a feature available to all litigants. Secondly, reliance on judicial review remedies infringements of independence but does not prevent them.

⁹⁹ It is worth pointing out, however, that in *Mbambo v Minister of Defence* 2005 (2) SA 226 (T), the High Court held that the CMA was the highest military court and an accused person's right to approach it for review constituted a right to the meaningful reconsideration of the conviction and sentence in accordance with s 35(3)(o) of the Constitution and hence there was no right of appeal from the CMA to the High Court.

Court stated, however, that [t]he constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to...the basic protection that is required.¹⁰⁰ The effect of that Court's approach is that the lower courts do not necessarily have to enjoy the same degree of independence enjoyed by the higher courts but have to enjoy the basic requirements of judicial independence discussed in Chapter Four, some of which have already been applied in this chapter.

As stated already in relation to the reasoning of the Constitutional Court above, the CMA would be expected to remedy the lower standard of independence of ordinary military courts. The CMA enjoys generally a higher degree of independence than the lower military courts. This is mainly enhanced by the presence of High Court judges or magistrates on the court. Members of the CMA are appointed, not assigned, as is the case with regard to military judges presiding on Courts of Military Judge and Courts of Senior Military Judge respectively.

Be that as it may, there are two concerns even if one follows strictly the line of thought outlined by the Constitutional Court on the independence of the lower courts. The first is that unlike magistrates' courts, military courts at the lower levels do not even meet some of the basic requirements of judicial independence. The standard of independence of military judges is much lower compared to that of magistrates who bring with them a stronger pedigree of independence. This is despite the fact that military courts wield similar powers to those of magistrates' courts, and sometimes even more powers when functioning outside the borders of South Africa as will be argued further in the next chapter.

The second concern is that, unlike the High Court, the CMA's composition is not immune from criticism in certain respects. For example, when that Court deals with matters other than those referred to in s 7(1)(a)

¹⁰⁰ *Van Rooyen v The State* (note 2 above) para 22.

of the Act,¹⁰¹ it is composed of three members—what could be referred to as the regular composition of that Court. In the latter instance, its Chairperson must have the required experience as a high court judge or a magistrate.¹⁰² The second member must be an appropriately qualified officer of the Permanent Force who holds a degree in law, with appropriate experience. Last but not least there must be a person with command experience in conducting field operations.¹⁰³ The Act does not require the latter to be legally qualified.

The composition of the CMA in the scenario described above suggests that it is possible that the Court could be chaired by a magistrate or retired magistrate with other military members sitting with him or her. While the independence of a magistrate may possibly not be disputed, to have a magistrate sitting on appeal or review with two ‘unsecured’¹⁰⁴ military officers does not make the Court of Military Appeals an appropriate court to remedy the lower levels of independence of military courts.¹⁰⁵ Moreover, one of the unsecured members is a lay person who is not free from command influence, and the Act does not protect this person. In addition, it is not even clear whether the two members of the military sit on that Court as judicial officers or not. The Act does not clarify their designation except that it states that they are members of that Court. This may well be a unique feature of military courts but the Constitution demands some modification of features such as this.

There is one more problem with respect to the CMA—that the Act does not require appointments of members of the Court to be fixed. This raises the question whether members of that Court enjoy security of tenure. In

¹⁰¹ See CMA’s description in Chapter Two.

¹⁰² The magistrate must have held that office for a continuous period of not less than 10 years. To date, the Chairperson of the Court of Military Appeals has always been a High Court judge.

¹⁰³ Military Discipline Act s 7(b)(i), (ii), and (iii).

¹⁰⁴ By this I mean that there are no measures to ensure that the relevant members enjoy the necessary guarantees of judicial independence.

¹⁰⁵ Note, however, Carnelley’s suggestion (note 14 above) 66 that the independence of the Court of Military Appeals is beyond reproach. However, it is not entirely clear whether she is referring to the CMA as a whole or to specific members of that Court.

practice, it may very well be that they are appointed for a fixed period but as pointed out already, practice alone cannot be relied on in order to achieve an appropriate degree of judicial independence.

6.3 Concluding remarks

In this chapter, it has been argued that there are still numerous challenges regarding the judicial independence of military courts. These can be discerned from the top (CMA) to the bottom (Court of Military Judge) of the hierarchy of the military court system. The key findings of this chapter may be summarised as follows:

- The current system of judicial assignments does not guarantee a military judicial office. In other words, there is no institutionalisation of a judicial office within the military court system.
- While military judges enjoy a certain degree of security of tenure due to fixed assignments provided for by the Act, the open-endedness of the relevant provisions and the lack of legislative clarity on the renewal of judicial assignments give rise to serious questions of independence.
- The grounds of removal for military judges are consistent with judicial independence but there are problems with respect to the procedure for removal and the functionaries involved in the process.
- The remuneration of military judges is inadequate compared to their civilian counterparts (magistrates). Furthermore, there are no special measures to guarantee the remuneration of military judges. The current system of remuneration involving the Military Bargaining Council and the Minister of Defence is not suitable for judicial officers.
- Military courts enjoy institutional independence on the adjudicative aspect but the same cannot be said with respect to their administration.

- The current system of review of cases by the military judicial review authority compromises the dignity of military courts and it interferes with their functioning.

On the whole, military courts do not meet most of the basic requirements of judicial independence and they are not likely to be perceived as impartial.¹⁰⁶ The use of the Constitutional Court's approach to the independence of lower courts does not save military courts from the problems identified above because these courts do not meet the minimum requirements of judicial independence. Finally, the status of the Court that could save them (CMA) is also questionable in some respects.

The next chapter will attempt to offer some solutions to the challenges identified above.

¹⁰⁶ Compare, however, Nel's conclusion (note 4 above) 254, 491 that '[a]lthough there is clearly room for improvement, *in general the CMA, CSMJ and CMJ appear to be adequately protected so that they can be regarded as sufficiently independent and impartial* to comply with the Constitution.' (emphasis added). As I have attempted to explain above, with respect, Nel misconceives the requirements of judicial independence and this has affected her overall conclusion on the subject in relation to its application to military courts.

CHAPTER 7

ADDRESSING THE JUDICIAL INDEPENDENCE OF SOUTH AFRICAN MILITARY COURTS

7.1 Introductory remarks

This chapter makes suggestions on ways in which the independence of South African military courts could be improved. It seeks to craft a suitable model of judicial independence for these courts. The chapter draws inspiration from the observation established in Chapter Four that there is no single correct formula for achieving the basic requirements of judicial independence. The requirements of judicial independence are known but measures required to achieve them are always debatable. There is therefore a lot of scope to develop different ideas geared at meeting the requirements of judicial independence by military courts. In this chapter, an attempt is made to answer a wide range of questions relating to various aspects of independence of military courts. The chapter is divided into three parts. Part one deals with preliminary questions that should be considered before making any suggestions on improving the independence of military courts, while part two looks at possible approaches for improving their independence. Finally, part three makes suggestions for the improvement of judicial independence of military courts.

7.2 Preliminary questions

In this part a number of preliminary questions are raised. The answers to the questions considered are critical in mapping out the correct path for crafting a model of judicial independence for military courts in the new South Africa.

7.2.1 The place of military courts within the South African court hierarchy in the light of Van Rooyen v The State¹

It has already been established in Chapter Two that military courts are part of the South African judicial system. It has also been noted that s 166 of the Constitution establishes four types of courts. These are the Constitutional Court; the Supreme Court of Appeal; the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts; and the Magistrates' Courts. Furthermore, s 166(e) also speaks of 'any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.' The table below illustrates the different levels of various courts in order of superiority.

¹ (2002) 5 SA 246 (CC). In this case, the Constitutional Court followed a controversial approach to judicial independence of lower courts when it accepted a lower standard of independence in relation to magistrates' courts than it requires of the High Courts. It did this for several reasons: (a) that the Constitution provided for a hierarchy of courts and in its view this justifies the different degrees of independence; (b) that higher courts deal with matters which were seen to be 'the most sensitive areas of tension between the Legislature, the Executive and the Judiciary;' and (c) that the increased level of institutional independence at the higher level was justified because the High Courts are in themselves a means of ensuring and guarding the independence of lower courts through the mechanism of judicial review. The central argument of the Constitutional Court suggests that judicial review is the remedy by which the lowered standard of independence is justified. In the context of military courts, this would mean that the remedy to the lower standard of independence of military courts at lower levels is judicial review by the Court of Military Appeals and higher civilian courts

Table A: Levels of courts

The Constitutional Court	The Supreme Court of Appeal
The High Courts or courts of similar status	
Regional Magistrates' Courts ²	
The Magistrates' Courts or courts of similar status	

The Constitutional Court is the highest court in all constitutional matters.³ It may decide only constitutional matters and issues connected with decisions on constitutional matters.⁴ On the other hand the Supreme Court of Appeal is the highest court of appeal except in constitutional matters,⁵ and may decide only appeals and issues connected with appeals.⁶

Section 166(e) envisages a fifth type of court. The courts referred to in s 166 can be divided into two levels – high and lower courts. It is difficult to determine where each of the military courts falls within the hierarchy of South African courts given the uniqueness and hierarchical nature of military courts. The table below illustrates the hierarchy of military courts as provided for in the Act.

Table B: Hierarchy of military courts

The Court of Military Appeals
The Court of Senior Military Judge
The Court of Military Judge
Commanding Officers' Disciplinary Hearing

² These are not mentioned in s 166 of the Constitution. They were created in terms of the Magistrates' Courts Act 32 of 1944.

³ Section 167(3)(a) of the Constitution, 1996.

⁴ Section 167(3)(b) *ibid.*

⁵ Section 168 *ibid.*

⁶ Section 168(3)(b) *ibid.*

An attempt to determine where each of the above courts falls within the hierarchy of the South African judicial system is crucial when determining suitable measures for structuring the judicial independence of military courts because such measures should partially be informed by the status of a particular court.⁷ In the light of the conclusion reached in Chapter Three regarding the status of the CODH, the determination must be made with the understanding that there are three categories of military courts in the context of this study. These are the Court of Military Appeals (CMA); the Court of Senior Military Judge (CSMJ); and the Court of Military Judge (CMJ). The last two can be referred to as lower military courts. This means a court specific analysis is warranted.⁸ Comparing military courts with courts of similar status within the hierarchy of South African courts may help shed some light on the actual status of these courts.

(a) Comparing lower military courts with magistrates' courts

The role of lower military courts suggests that magistrates' courts probably provide a suitable basis of comparison for purposes of determining the appropriate measures to ensure the independence of military courts. In this part the CMJ will be compared with district magistrates' courts while the CSMJ will be compared with regional magistrates' courts. However, the Constitution does not draw a distinction between magistrates and regional magistrates' courts—that distinction is a creature of statute. As far as judicial independence is concerned, the distinction between the two courts only affects one element—financial security of the respective judicial officers. Regional magistrates naturally earn more than district magistrates.⁹ For purposes of this study the distinction may prove to be helpful in determining

⁷ This is in line with the approach of the Constitutional Court in *Van Rooyen v The State* (note 1 above).

⁸ The Court of a Senior Military Judge is not necessarily a higher court because it has no appellate powers.

⁹ See Proclamation 54 of 23 September 2011 made in terms of the Magistrates' Act No. 90 of 1993 for salaries of different grades of magistrates at the time of writing this thesis.

appropriate remuneration for both military judges and senior military judges.

The table below shows how the CMJ compare with district magistrates' courts in terms of jurisdiction in respect of persons, offences and sentencing powers.

Table C: Comparison between district magistrates' courts and a court of military judge

	DISTRICT MAGISTRATES' COURTS	COURT OF A MILITARY JUDGE
<i>Qualifications and experience required of presiding officer</i>	Be a fit and proper person; successful completion of an application course; a pass in civil service lower law examination or equivalent ¹⁰	Degree in law, military law course, rank of major or equivalent, be a fit and proper person of sound character, three years' of experience as a practising advocate or attorney or three years' experience in the administration of criminal or military justice
<i>Jurisdiction in respect of persons (criminal jurisdiction only)</i>	All persons within the area of court's jurisdiction in the Republic of South Africa	Only persons subject to the military discipline code (but only up to the rank of major or equivalent) within or beyond South African borders
<i>Jurisdiction in respect of offences</i>	All offences ¹¹ except treason, murder, rape and compelled rape	All offences (both military and civilian) except murder, treason, rape, culpable homicide, or any

¹⁰ These requirements are in terms of s 10 of the Magistrates' Courts Act 32 of 1944 and General Regulations (GNR. 361 of 11 March 1994) enacted in terms of the Magistrates Act 90 of 1993 (Regulation 3).

¹¹ Both civilian and military offences; but nothing much should be read into this because civilian courts can try military offences only on paper since they do not do so in practice.

		offence under ss 4 and 5 of the MDC ¹²
<i>Limits in respect of a sentence of imprisonment</i>	Imprisonment for a period not exceeding three years	Maximum is two years
<i>Limits in respect of a fine</i>	Maximum of R60 000, 00	Maximum of R6000,00
<i>Extra-territorial jurisdiction and sittings</i>	No	Yes

The first row shows that the expectations with regard to the qualifications of military judges are higher than those required in the case of district magistrates. The key requirement that separates the two is that military judges must be qualified military law officers. This entails successful completion of three military courses: basic military training, officers' formative course, and advanced military law course. Taken together, these courses take almost a year to complete depending on the arm of service to which a particular military judge belongs. The second row of the above table shows that magistrates' courts deal with more people than the CMJ. South Africa's total population is estimated at 49, 32 million.¹³ This should be contrasted with the total size of the SANDF with a reported membership of 75 086 for the period 2007/08.¹⁴ The second row shows that magistrates' courts try more offences than the CMJ. The offence that separates the two is culpable homicide. Magistrates' courts can try this offence while the CMJ cannot. Similarly, the fourth row shows that magistrates' courts have more sentencing powers in respect of imprisonment

¹²Offences endangering the safety of forces and offences in relation to conduct in action. These two offences carry sentences of 30 and ten years respectively.

¹³ Statistics South Africa *Mid-year population estimates* July 2009 available at <http://www.statssa.gov.za/publications/P0302/P03022009.pdf> [accessed on 24 May 2010].

¹⁴ Annual Report of the Department of Defence 2007/08, 17.

than those possessed by a CMJ. Finally, the fifth row suggests that magistrates' courts can impose a far more severe fine than the CMJ.¹⁵

There is no doubt that magistrates possess more powers than the CMJ. However, the CMJ is unique in three senses. First, it tries both military and civilian offences as a matter of law and practice. Second, it has extra-territorial jurisdiction. Third, it may at times be required to operate in a war or war like environment such as peace support operations. These aspects present a mixed picture as to how magistrates' courts compare with the CMJ for purposes of determining the level of protection which should be afforded the CMJ to ensure its independence. Nonetheless, the CMJ compares very closely with magistrates' courts.

Let us now consider the position of the CSMJ in relation to that of regional magistrates' courts. The table below illustrates how the two compare.

Table D: Comparison between the CSMJ and regional magistrates' courts

	REGIONAL MAGISTRATES' COURTS	COURT OF SENIOR MILITARY JUDGE
<i>Qualifications and experience</i>	LL.B or a pass in Public Service Senior Law Examination and	Degree in law, military law course, rank of colonel or equivalent, be a fit and proper person of sound

¹⁵ However, this does not represent the total picture because the maximum fine of R6000, 00 which may be imposed by the CMJ is subject to a maximum penalty imposed by law for a particular offence and its own penal jurisdiction. It means that there could be instances where the CMJ would be empowered to impose a fine over R6000, 00 provided the offence in question requires such and the maximum imprisonment for that offence do not exceed the penal jurisdiction of a CMJ. For example, if a particular offence provides for a period of imprisonment not exceeding three years with an alternative of imposing a fine not exceeding R7000, 00, the CMJ would not have jurisdiction to try the offence in question because the maximum period of imprisonment for that offence exceeds its penal jurisdiction.

<i>required of presiding officer</i>	recommended as suitable for appointment by the Magistrates Commission	character, five years' of experience as a practising advocate or attorney or five years' experience in the administration of criminal or military justice
<i>Jurisdiction in respect of persons (criminal jurisdiction only)</i>	All persons within the area of court's jurisdiction in the Republic of South Africa	Any person subject to the MDC
<i>Jurisdiction in respect of offences</i>	All offences except treason	Any offence other than murder, treason, rape or compelled rape and culpable homicide committed within the Republic of South Africa
<i>Limits in respect of a sentence of imprisonment</i>	Period not exceeding 15 years	No limit
<i>Limits in respect of a fine</i>	Maximum of R300 000, 00	Maximum of R6000,00 but subject to the maximum fine provided by law for a particular offence
<i>Extra-territorial jurisdiction and sittings</i>	No	Yes

The first row shows that military legislation is much clearer in terms of the requirements for appointment of military judges. However, most of the requirements in the CSMJ column are considerations in the appointment of regional magistrates i.e experience in the administration of justice. That said, there are two unique requirements for appointment as a senior military judge. The one is that a candidate must be a qualified military officer which requires completion of certain military course as already explained in respect of ordinary military judges. The other is that one must be a qualified

military legal practitioner by virtue of having passed a departmental course in military law. This may suggest that a bit more is expected of senior military judges in terms of qualifications and this must be viewed in the context in which military judges function.

As was the case in Table C, the second row shows that regional magistrates' courts in all likelihood try more people than the CSMJ because the civilian population will almost always be far greater than persons subject to the MDC in any given area. The same logic obtains in respect of the third row—that regional magistrates' courts try more serious offences than the CSMJ. The CSMJ only has a chance to try more offences when such offences have been committed beyond the borders of the Republic of South Africa. It is common cause that this rarely happens because it largely depends on the extent to which members of the defence force are deployed outside the borders of South Africa.

The fourth row shows that the CSMJ has more sentencing powers than regional magistrates' courts with respect to imprisonment. However, this is slightly misleading because the extensive powers of the CSMJ with respect to imprisonment are rarely exercised. The reason for this is that the CSMJ does not have jurisdiction to try most serious offences¹⁶ (committed within the Republic of South Africa) which would attract a sentence of severe imprisonment. This means that despite the massive potential of the CSMJ to hand down severe sentences which may also include life imprisonment, regional magistrates' courts still hand down more severe sentences of imprisonment than the CSMJ in practice. Nevertheless, the fact that the extensive sentencing powers of the CSMJ are infrequently exercised does not necessarily mean that such powers must be down played when considering the status which should be accorded to the CSMJ. The infrequency does not change the fact that the court possesses such powers.

¹⁶ These are murder, culpable homicide, rape and compelled rape. All these offences are generally common within the Republic of South Africa.

On the whole, the comparison between regional magistrates' courts and the CSMJ also presents a mixed picture. Regional magistrates' courts are stronger in some aspects while the CSMJ is in other aspects. Ultimately, the two could be regarded on a par.

In Canada, a special committee was appointed to consider the compensation of military judges.¹⁷ One of the crucial issues the Committee had to deal with was to determine 'the appropriate level of Military Judges' compensation taking into account the nature of their role and the tasks they undertake.'¹⁸ The Committee compared the role of military judges to that of other judicial officers in Canada and recommended that Provincial Court Judges across Canada provide an appropriate basis of comparison for purposes of determining the appropriate level of compensation.¹⁹ Provincial Court Judges are largely the equivalent of magistrates in South Africa. By way of analogy, the outcome of the Canadian study may serve to indicate that comparing military courts with magistrates' courts is generally correct.²⁰ Therefore, in this thesis, measures adopted to ensure the independence of magistrates in South Africa will, on occasion, be referred to where relevant and appropriate.

(b) *The status of the Court of Military Appeals (CMA)*

As noted in Chapter Two the CMA is the highest military court. It exercises full appeal and review powers in respect of the proceedings of any

¹⁷ Department of National Defence *Report on the Compensation of Military Judges* (2004) www.forces.gc.ca/site/reports/mjcc04/index_e.asp [accessed on 30 March 2006]. Canada stands out as a country that has probably done the most studies in the area of trying to understand the place of military courts within the hierarchy of a judicial system.

¹⁸ *Ibid.*

¹⁹ It is important to note that another member of the Committee, L'Heureux-Dube J, disagreed with the majority and took the view that military judges should be granted a status equivalent to that of Canadian Superior Court judges.

²⁰ For some related and fairly recent developments in Canada see Department of National Defence, 'Report on the Compensation of Military Judges' (2008) www.forces.gc.ca/site/reports-rapports/mjcc08/index-eng.asp [accessed on 15 April 2010]. This report builds on the studies carried out in the preceding years. It makes recommendations on the remuneration of military judges taking into account a number of new factors which have arisen since the previous studies. These will be dealt with later in this chapter further below.

case or hearing conducted before any military court.²¹ Its status was recently debated by the High Court in *Mbambo v Minister of Defence*²² and *Borman v Minister of Defence* respectively.²³ These cases primarily dealt with the question whether soldiers had the right of appeal from military courts to the High Court. Both courts held that there was no right of appeal from the CMA to the High Court because an accused person's right to approach the CMA constituted a right to the meaningful reconsideration of the conviction and sentence for purposes of s 35(3)(o) of the Constitution. That provision provides for an accused right 'of appeal to, or review by, a higher court.' Although the Court in *Borman* followed the approach in *Mbambo*, it also added that the High Court had inherent power to review proceedings of all military courts including the CMA for regularity because all military courts are inferior courts for purposes of the Supreme Court Act 59 of 1959.²⁴ Nevertheless, the Court declined to exercise this power because the seat of the CMA did not fall under its jurisdiction.²⁵

The conclusion reached by the High Court in the above cases means that the CMA is the final court with regard to appeals from military courts of first instance. This makes that Court very powerful and important in the hierarchy of military courts despite the fact that it is an inferior court for purposes of the Supreme Court Act.

In the absence of the Supreme Court Act, the powers which the CMA exercises suggest that it is a court of a status similar to High Courts. The design of its independence must reflect that fact. It is not necessarily suggested that the CMA must enjoy the exact same level of independence enjoyed by the High Courts—its independence must simply capture the essence of it being a court of a status similar to High Courts, and it being a court of final instance in exercising appeals from lower military courts.

²¹ Section 8(1) of the Military Discipline Act.

²² 2005 (2) SA 226 (T).

²³ 2007 (2) SA 388 (C). The seat of the CMA is in Pretoria.

²⁴ *Ibid* para 15.

²⁵ *Ibid*.

7.2.2 Approaches for improving the independence of military courts

There are two possible approaches to resolving the problems identified in Chapter Six. The first of these is that the problems can easily be resolved by integrating military courts into the mainstream judiciary—especially the lower military courts. This can be referred to as an easy escape route. The approach may, for example, entail integrating the CMJ and the CSMJ into the magistracy but recognizing the unique role of these courts. They would be specialized magistrates courts which could for example be referred to as military magistrates' courts. There is no doubt that this approach will resolve most of the problems identified. The situation in New Zealand is not entirely clear because it appears the Court Martial is now influenced greatly by civilians but the legislation regulating Courts Martial is administered by the New Zealand Defence Force.

Following the ruling in *Lane v Morrison*,²⁶ Australia appears to be heading in the direction described above, and breaking with a long standing tradition of separate existence of military courts. A Bill (Military Court of Australia Bill) introduced before the Parliament of that country in 2012 creates the Military Court of Australia which would be integrated within the civilian court structure in every sense of the word, and it would be a superior court of record.²⁷ The Court will have judges and magistrates serving in its two divisions respectively, and it would be administered by Chief Justice of the Military Court of Australia.²⁸ These judicial officers will not be members of the Australian Defence Force (ADF) but would need to have understanding of service in the ADF by reason of experience or training.²⁹ Judges and magistrates of the court would hold tenure until they retire at the age of 70 years, and their remuneration will be determined by

²⁶ (2009) 239 CLR 230. I revert to this case further below.

²⁷

http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4853 [accessed on 17 July 2012].

²⁸ See ss 10 and 29 Military Court of Australia Bill 2012.

²⁹ *Ibid* s 11(3)(b).

the Remuneration Tribunal.³⁰ While one acknowledges that the bill in question is yet to be passed, the proposal is one of the most radical steps in recent times in the reform of military courts aimed at addressing problems of institutional independence along the lines discussed in Chapter Six with reference to South African military courts. The approach probably represents the ultimate future direction of military court reform with respect to the independence of these courts.

However, in the context of South Africa, the scenario described above should be approached with caution because there are factors which militate against it.

The first is that s 200(1) of the Constitution requires military structures to stay within the military. That section provides that '[t]he defence force must be structured and managed as a disciplined *military force*.' (emphasis added). Military courts are at the centre of discipline in the defence force. They are part of the defence force and must preferably be managed within it.

The second factor which militates against incorporating military courts into the mainstream judiciary is their uniqueness as discussed in Chapter Two. The third factor is a pragmatic one—relating to the timing of such a radical step. It has been noted in Chapter Four that judicial independence is an evolving concept, and in this context, South Africa is probably not ready for such a radical transition.

In Canada, the approach is to incorporate principles governing the independence of civilian courts into the military judiciary. In that country, there has been an attempt to achieve parity between civilian and military courts at the level of remuneration.³¹ Thus some countries have incorporated or are in the process of incorporating their military courts into

³⁰ *Ibid* s 20.

³¹ See Department of National Defence, 'Report on the Compensation of Military Judges' (2004) (note 17 above).

the mainstream judiciary while others have not.³² South Africa should take these developments into account as it seeks to improve the independence of military courts.

In my view, the best way of improving the independence of South African military courts is to follow the second approach which entails incorporating principles governing the independence of the civilian courts into military courts but making the adjustments necessitated by the uniqueness of these courts. This approach is at the heart of this study, and in fact is what the Constitution requires as argued above. It does not necessarily mean limiting the application of judicial independence to military courts as judicial independence is not subject to limitation. The approach requires balancing different factors pointed out in the introductory chapter but ultimately ensuring that all military courts enjoy the basic requirements of judicial independence.

An analysis of how the independence of military courts could be improved within the existing set up is set out below.

7.3 Improving the judicial independence of military courts

In this part, I analyse how various facets of independence of the military Judiciary could be dealt with.

7.3.1 Institutionalising a military judicial office³³

The Constitution requires all judicial officers to be appointed to a judicial office.³⁴ Section 174(1) provides that '[a]ny appropriately qualified woman or man who is a fit and proper person may be *appointed* as a judicial

³² Other examples of countries which do not regulate military courts as part of the mainstream judiciary are the United States and the United Kingdom although military judges in the latter country are civilians.

³³ What is meant by institutionalising a military judicial office is that military judges must be appointed to a judicial office instead of being assigned to serve as military judges.

³⁴ Section 174(1) and (7).

officer.’ (emphasis added). Both the *UN and the African Union Principles* speak of a term of office for judges.³⁵ It is proposed that ss 174 and 176 of the Constitution read with the above-mentioned principles envisage a judicial office to be institutionalised because they speak of appointment of judicial officers and judges holding office.

Furthermore, certain provisions of the Magistrates’ Act echo these sentiments. For example, s 10 of this Act read with s 13 of the same Act suggests that a judicial office for magistrates is institutionalised. It (s 10) provides that ‘[t]he Minister shall, after consultation with the Commission, *appoint* magistrates in respect of lower courts...’ (emphasis added). Further, in s 13 of the same Act, reference is made to ‘vacation of *office* and discharge of magistrates’, and ‘[a] magistrate shall vacate his or her *office* on attaining the age of 65 years.’ (emphasis added) These, in my view, show that a judicial office is seen as an institution to which all judicial officers must be appointed.

The recent establishment of the Office of the Chief Justice³⁶ reinforces the view that a judicial office must be viewed as an institution in South Africa. Administratively, the office will be headed by ‘Secretary-General: Office of the Chief Justice’. It exists as an independent department alongside other national departments.

In terms of s 174(7) of the Constitution, ‘[o]ther judicial officers must be *appointed* in terms of an Act of Parliament...’ (emphasis added). There is no reason to believe that the judicial office referred to in s 174 does not apply to other judicial officers such as military judges. These judicial officers (military judges) must be appointed to a judicial office, and not assigned to serve as military judges. The full institutionalisation of a military judicial

³⁵ *UN Basic Principles on the Independence of the Judiciary*, Principle 11 and *African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* (DOC/OS(XXX)241 Principle 4(l)). These are obviously not binding but have a strong persuasive force and have been referred to with approval by the Constitutional Court in *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC).

³⁶ Established in terms of Proclamation No. 44, 2010 amending Schedule 1 of the Public Service Act.

office is an important step in improving the independence of the military judiciary. It will enhance people's confidence in the military judiciary and the dignity of a military judicial office. The manner of appointment of military judges affects the extent to which they feel secure in their positions and how they are seen by those they serve. An analysis follows of the extent to which a military judicial office is institutionalised in five countries chosen for comparative study.³⁷

The United States still follows the system of military judicial assignments in a strict sense of the word; but the office of a military judge exists—having been created in 1969, 19 years after the enactment of the UCMJ in 1950.³⁸ Before that, there were no military judges as known today. Trials were presided over by military law officers who had very limited powers and could even be overruled by lay members of courts-martial.³⁹ In terms of the UCMJ military judges are *assigned* to each general or special court-martial on an ad-hoc basis.⁴⁰ Their term expires when the trial comes to an end as they are not full-time. However, after *Weiss v. United States*, the Army and the Coast Guard created three year terms of office by regulation but other branches of the services did not follow suit.⁴¹ Strikingly, a military judge may be assigned non-judicial duties while serving as a judicial officer.⁴² The ad-hoc system might be good for those administering

³⁷ The focus would just be on whether judges are appointed to a judicial office or are assigned to serve as judicial officers without looking at issues of tenure: those are dealt with elsewhere in the chapter.

³⁸ The United States military justice system was substantially reformed in 1950 because of the dissatisfaction with the then system during World War II (see Fredric I. Lederer & Barbara Hundley Zelff 'Needed: An Independent Military Judiciary. A Proposal to Amend the Uniform Code of Military Justice' 25, in Eugene R. Fidell & Dwight H. Sullivan (ed.) *Evolving Military Justice* (2002)).

³⁹ For an incisive historical development of the United States military justice system see Fredric I. Lederer & Barbara Hundley Zelff *ibid*.

⁴⁰ Section 826. Art 26(a).

⁴¹ *Weiss v United States* 510 U.S 163 (1994)

The disparity between the different arms of service was unsuccessfully challenged before the United States District Court for the District of Columbia in *Oppermann v. United States* 2007 Civil Action No. 06-1824 (EGS). The Court relied on the following three reasons: that the due process clause does not require military judges to have fixed terms as held in *Weiss v. United States*; the principle that considerable deference is owed to the considered professional judgment of appropriate military officials; and that Congress has specifically sanctioned distinctions among the different arms of services in authorising each service Secretary to prescribe regulations for the manner in which military judges are organised.

⁴² *Ibid* s 826. Art 26(c).

the military justice system in the sense that it allows them to chop and change military legal personnel as they see fit, a practice which some refer to as the flexibility element of the system. Indeed, flexibility is generally a good thing for the military justice system given that the system sometimes functions to satisfy operational needs of the military which may require rapid deployment of personnel on occasion. However, this should not be tantamount to undermining a military judicial office and the independence of military judges.⁴³ Judicial independence must trump flexibility in this respect. Flexibility is required only as far as it relates to the ability of military judges to deploy to any place the military may require, for purposes of exercising judicial functions.

Until 2009, Australia had fully institutionalised a military judicial office in order to enhance the independence of military courts.⁴⁴ The reforms made provision for full-time military judges *appointed* to the Australian Military Court created as a permanent court.⁴⁵ However, in a dramatic turn of events, the High Court of Australia declared the provisions creating the Australian Military Court to be unconstitutional in *Lane v Morrison*⁴⁶ for a number of reasons. Key among these are: (a) the Australian Military Court exercises the judicial power of the Commonwealth otherwise than in accordance with Ch III of the Australian Constitution and it cannot validly exercise the judicial power of the Commonwealth of Australia;⁴⁷ (b) the fact that the Australian Military Court makes binding and authoritative decisions of guilt or innocence independently from the chain of command of the defence forces. This case dealt with issues peculiar to the Australian Constitution which may be of limited relevance in the context of the South

⁴³ As pointed out in Chapter Two, this system was nevertheless approved by the United States Supreme Court in *Weiss v United States* (note 41 above) where the Court relied unpersuasively on the long history of uniqueness of courts martial.

⁴⁴ This was done through the Defence Legislation Amendment Act 2006.

⁴⁵ For some discussion leading to the reform of the Australian military justice system see Department of Defence, Australian Government Response to the Senate Foreign Affairs, Defence and Trade References Committee 'Report on The Effectiveness of Australia's Military Justice System' (2005) 5, www.defence.gov.au/mjs/docs/MJ_GOVERNMENT_RESPONSE_4oct052.pdf [accessed on 20 June 2006].

⁴⁶ *Lane v Morrison* (note 26 above).

⁴⁷ *Ibid* para 114.

African Constitution. While the case will clearly make people pause and think about the nature of military courts for a moment, it is unlikely that it (on its own merits) would have wider implications for military justice systems in other jurisdictions for the above stated reason—especially among those countries studied.⁴⁸

The Australian government moved in very quickly to address the vacuum left by *Lane*. It passed two pieces of legislation—the Military Justice (Interim Measures) Act (No.1) 2009 and the Military Justice (Interim Measures) Act (No. 2) 2009. According to the explanatory memoranda, the purpose of the two Acts is to return the service tribunal system that existed before the creation of the Australian Military Court.⁴⁹ This is a temporary measure until the government can enact other legislation that would create a Chapter III court.⁵⁰

In the current system (at the time of writing), military judicial officers are *appointed* for each general court-martial or restricted court martial. In other words they are appointed on an *ad hoc* basis as and when a court-martial is convened by way of a convening order.⁵¹ The appointment terminates at the end of the trial. This means a military judicial office is currently not institutionalised in Australia. However, this system does not in any way represent how the Australian military justice system would look like in the near future given that the government looks determined to create a permanent military court of Australia with its judicial officers appointed on a full-time basis as already discussed above.⁵² The current system should therefore be viewed within the context in which it was enacted. It is a

⁴⁸ However, the ruling was a major setback for the newly created Australian Military Court and has created some crisis in the Australian military justice system. For an incisive discussion of that case, and its aftermath see Kathryn Cochrane 'Lane v Morrison' (2009) 61AIAL Forum 62.

⁴⁹ Military Justice (Interim Measures) Bill, (No. 1) 2009.

⁵⁰ There is some skepticism as to whether the government has the power to do this. See Cochrane (note 39) 73.

⁵¹ See s 119(1) of the Military Justice (Interim Measures) Act (No 2) 2009.

⁵² The government seems to have found a way out of *Lane v Morrison*. See recent comments of the Attorney-General and the Minister of Defence outlining the plan for the new Australian Military Court published on 24 May 2010 www.australia.to/2010/index.php?option=com_content&view=article&id=2938:military-court-of-australia&catid=122:security&Itemid=169 [accessed on 07 June 2010].

stop gap while the government is trying to address the flaws raised in *Lane v Morrison* in relation to the creation of the Military Court of Australia.

The United Kingdom institutionalised military judicial office decades ago, but military judicial officers are still referred to as judge advocates although they are now civilians as noted already.⁵³ These officers are *appointed* by the Lord Chancellor (a civilian), and hold a judicial office until they retire at the age of 70 years.⁵⁴ A judge advocate is specified for each court proceeding by or on behalf of the Judge Advocate General.⁵⁵

In contrast, and in an unprecedented reform of its military justice system, New Zealand has recently done away with the concept of judge advocates and fully institutionalised a military judicial office.⁵⁶ The system now boasts a Chief Judge, Deputy Chief Judges, and other judges who preside over the Court Martial all of whom are *appointed* to a judicial office by the Governor-General by warrant.⁵⁷

Canada led the way in the institutionalisation of a military judicial office as far back as 1998 following a successful challenge against the independence of its general court-martial in *R v Généreux*.⁵⁸ In that country, military judges are appointed by the Governor in Council, and they hold a judicial office.⁵⁹

Of the five countries surveyed, only the United States assigns officers to serve as military judges instead of appointing them to a judicial office. The rest use the system of appointments and have fully institutionalised a military judicial office and appoint suitable personnel to a judicial office, although Australia is not yet fully there but strongly heading in that direction.

⁵³ Section 155(1) of the Armed Forces Act 2006 (c.52).

⁵⁴ Sections 29 and 30 of the Courts Martial (Appeals) Act 1951 (c.46).

⁵⁵ Section 155(5) of the Armed Forces Act 2006.

⁵⁶ See Chris Griggs 'A New Military Justice System for New Zealand' (2006) 6 *New Zealand Armed Forces Law Review* 62 for a full account of these reforms.

⁵⁷ Sections 12, 13 and 14 of the Court Martial Act No. 101 2007.

⁵⁸ (1992) 88 DLR (4th) 110.

⁵⁹ See Art 165.21 of the National Defence Act, R.S.C. 1985, c N-5.

There is a clear emerging trend to fully institutionalize a military judicial office because this approach enhances the independence and status of military courts. With the establishment of permanent military courts and military judges in 1999, South Africa is moving towards full institutionalization of a military judicial office. What needs to be done now is to ensure that military judges are appointed to a military judicial office instead of being assigned to serve as such. This approach is more consistent with the Constitution, the relevant *UN and African Union Principles* mentioned above, and is in consonant with emerging foreign trends. Moreover, it does not require a major policy shift given that all members of the CMA are appointed, including the lay members.

7.3.2 Determining the tenure of military judges

In Chapter Four, we learnt that judicial officers need not necessarily be appointed for life but at the same time recognised the significance of fixing judicial appointments for a longer period of time. In Chapter Six, two concerns were noted regarding the tenure of military judges—the first being the lack of legislative clarity on the tenure required, and the second relating to the practice of fixing judicial assignments for a period of two years.

Comparatively, standards and practices vary across the various jurisdictions considered. In Australia, judge advocates and defence force magistrates have no tenure. They are appointed for each court-martial from a panel of judge advocates.⁶⁰ Those on the panel remain on it for a maximum period of three years but are eligible for re-appointment.⁶¹ However, with a new Military Court of Australia on the horizon, judges to be appointed to that court are set to get tenure similar to that on the federal bench.⁶² The problem of appointing judges on a case by case basis was dealt

⁶⁰ Section 119 read with ss 117 and 127 of the Military Justice (Interim Measures) Act (No. 1) 2009.

⁶¹ Section 127(2) *ibid.*

⁶² See s 11(6) of Military Court of Australia Bill (note 27 above).

with by the Canadian Supreme Court in *R. v. Généreux*.⁶³ In that case, the Court held that there was no objective guarantee that a career of a military judge would not be affected by decisions tending to favour an accused rather than the prosecution. The Court held, further, that, a reasonable person might well have entertained an apprehension that the person chosen as judge advocate had been selected because he had satisfied the interests of the executive, or at least not seriously disappointed executive expectations in previous proceedings. As noted in Chapter Six, South Africa correctly moved away from a system of appointing military judges on a case by case basis in 1999 following the *Freedom of Expression* case; there is therefore no need to discuss, further, the pros and cons of *ad hoc* appointments of military judges.⁶⁴

Again with reference to Australia, the invalidated system had radically changed the situation when the Australian Military Court was created in 2007. In terms of the relevant law at the time, military judges were appointed to hold office for ten years, and this was done in order to enhance the independence and impartiality of military courts.⁶⁵ To further strengthen their independence from the chain of command, military judges would not be eligible for promotion during their tenure as judges.⁶⁶ As already suggested, that is now history but worth noting.

The United States uses an approach very similar to that used in Australia at the time of writing—no fixed term of office or life tenure for military judges. They serve only as long as proceedings last, and at the pleasure of

⁶³Note 58 above.

⁶⁴ For some analysis on the advantages and disadvantages of a fixed-term of office for military judges, see The Military Justice Act of 1983, Advisory Commission Report Vol I (USA) 8-9 http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf [accessed on 18 April 2010].

⁶⁵Sections 188AC(2) and 188(AP)(4) of the Defence Legislation Amendment Act 2006 Schedule 1. See also Department of Defence, Australian Government Response to the Senate Foreign Affairs, Defence and Trade References Committee (note 45 above) for discussions leading to the adoption of the above Act.

⁶⁶ *Ibid.* For an analysis of those reforms, see Rachel Jones 'Recent Reforms to the Australian Defence Force Discipline System' *New Zealand Armed Forces Law Review* (2007) Vol. 7 77.

the Judge Advocate General.⁶⁷ The idea of tenure for military judges was rejected in 1983 by an Advisory Commission mainly because it thought that '[c]reating tenure for judges for the sake of appearance would misleadingly suggest that the system does not currently operate with an independent judiciary;' and also that, in the view of the Commission, 'the need to maintain assignment flexibility outweighs any possible benefit regarding appearance.'⁶⁸

The lack of tenure for military judges reached the court of Military Appeals in *United States v Graf* where the Court held that fixed terms were not required for military judges.⁶⁹ In *Weiss v United States*, the Supreme Court held that a fixed term of office 'has never been part of the military justice system.'⁷⁰ As pointed out in Chapter Two, the *Weiss* judgment is poorly reasoned because it relied too much on the historical make up of military courts without a substantive engagement with the issues that faced the Court in that case. Those two cases have made it easier for the Government to maintain the *status quo* regarding the independence of military judges. Notwithstanding the above authorities, fresh calls have been made to amend the UCMJ to establish an independent military judiciary including tenure for military judges.⁷¹ The thrust of the argument for this call is that military judges in the current set up do not present an appearance of independence mainly due to the fact that they lack any form of tenure.⁷²

⁶⁷ See s 826 Art26. of the UCMJ.

⁶⁸ The Military Justice Act of 1983, Advisory Commission Report (note 64 above) 9. However, three members of the Commission dissented against the majority opinion.

⁶⁹ 35 M.J. 450 (1992).

⁷⁰ Note 43 above, 178.

⁷¹ See Fredric I. Lederer & Barbara Hundley Zeff (note 38) 54-55. Surprisingly, a recent Report of the Commission on Military Justice, October 2009, did not raise any issue concerning the independence of military judges despite the glaring problems on the independence of the system. The Commission was sponsored by the National Institute for Military Justice and the American Bar Association.

⁷² Fredric I. Lederer & Barbara Hundley Zeff *ibid* 28-30. This is with the exception of the Army and the Coast Guard which prescribe three year terms for military judges.

In India, there is a new dawn in the history of the military justice system of that country.⁷³ The Government recently established the Armed Forces Tribunal which consists of the chairperson (judge or retired judge of a high court) and such number of judicial and administrative members as the Central Government may deem fit.⁷⁴ Members of this Tribunal hold office for a renewable term of four years.⁷⁵ However, the Tribunal is not part of the mainstream court-martial system as it is largely an appellate forum. The regular military courts are governed in terms of the Army, Air Force, and Navy Acts discussed in Chapter Three.⁷⁶ The system still resembles largely the old British courts-martial system where members serve on such tribunals on an *ad hoc* basis.⁷⁷

In complete contrast, military judges of the United Kingdom (judge advocates and civilians), New Zealand (civilians), and Canada have tenure of office until they retire on attaining the age of 70 years⁷⁸ and 60 years in the case of Canada.⁷⁹ Prior to 2001, the age of retirement for judge advocates in the United Kingdom used to be 65 years. In New Zealand, judge advocates used to be appointed on an *ad hoc* basis as there was no permanent court-martial before 2009, just like is currently the situation in the United States

⁷³ See generally Umesh Jha (ed.) *The Military Justice System in India: An Analysis* (2009) 257 commenting on the new era and providing some analysis of the Tribunal. For a general analysis of military law systems in the South Asia, see another book by the same author, U.C. Jha (ed.) *The South Asian Military Law Systems* (2010).

⁷⁴ The Armed Forces Tribunal Act 55 of 2007, s 5.

⁷⁵ *Ibid* s 8.

⁷⁶ Army Act 46 of 1950; Air Force Act 45 of 1950; and the Navy Act 62 of 1957.

⁷⁷ For a description and critical analysis of courts-martial in India see Jha (note 73 above) 225-255.

⁷⁸ See s 32 of the Courts Martial (Appeals) Act 1951 (c.46) and s 19(1) of the Court Martial Act 2007 respectively.

⁷⁹ Section 165.21(3) of the National Defence Act, R.S.C. 1985, c. N-5 <http://laws-lois.justice.gc.ca/eng/acts/N-5/page-57.html#h-104> [accessed 17 July 2012]. The new position in Canada follows a ruling by the Court Martial Appeal Court in *R. v. Leblanc* 2011 CMAC 2 that five year renewable terms with a retirement age determined by regulation were unconstitutional on the basis that they did not provide judicial independence (security of tenure) required by s. 11(d) of the *Canadian Charter of Rights and Freedoms*. See paras 44-47 in particular. What weighed heavily with the Court was the increased role assigned to military judges in matters of criminal justice and military discipline and the fact that they essentially exercise the same functions and powers as superior and provincial courts of criminal jurisdiction. See paras 42 and 47 of the judgment in this regard.

and Australia.⁸⁰ The key driver of reform of the New Zealand military justice system has been the New Zealand Bill of Rights Act 1990, and to some extent the developments in Canada and the United Kingdom.⁸¹

Tenure of office until retirement is probably one of the most effective measures that can be taken to protect the independence of judicial officers. Its advantages are obvious, and need not be emphasised here. Full tenure has been proposed by Lederer and Zeliff for the United States military judges as a way of creating an independent military judiciary. In South Africa, the Constitution does not require life tenure for any judicial officer. Whether or not tenure until the age of retirement should be granted is therefore a matter of policy choice by the legislature—as long as the adopted scheme ensures that the courts are independent.

The issue of tenure has been debated by various people in many jurisdictions.⁸² Be that as it may, there are a number of pragmatic reasons which suggest that the idea of tenure until the age of retirement may not be suitable for the military judiciary or in general. The first among these is that in the context of the military, it may cut off military judges from other career opportunities within the military.⁸³ While one acknowledges the fact that the purpose of judicial independence is not necessarily to appease judges, it is important to consider the context in which the concept is being applied. However, career ambitions (beyond military judiciary) of military judges are

⁸⁰ For a brief description of the old court-martial system in New Zealand, see Chris Griggs (note 56 above) 80-82.

⁸¹ See *ibid* 63-64.

⁸² See for example the discussion in the context of the United States Supreme Court by Steven G. Calabresi and James Lindgren 'Term Limits for the Supreme Court: Life Tenure Reconsidered' (2006) Vol. 29 *Harvard Journal of Law and Public Policy* 770 in which the authors call for a constitutional amendment to address a number of problems associated with life tenure. Although that discussion takes place in an entirely different context, it serves to highlight potential problems of tenure until the age of retirement.

⁸³ This factor was positively considered by the Canadian Supreme Court in *R. v. Généreux* (note 58 above). The Court stated that '[i]t would not...be reasonable to require a system in which military judges are appointed until the age of retirement.' However, the position taken in *Généreux* was challenged by the Court Martial Appeal Court of Canada in *R. V. Dunphy and R. V. Parsons* [2007] CMAC 1, paras 19-20 where the Court held that the rationale behind *Généreux* has changed because military courts look different today. As noted above, this view has been confirmed in *R. v. Leblanc* by the same Court in 2011.

usually linked to higher financial incentives offered in other positions. Most of the positions military judges aspire to are management related. Generally, one of the objectives of the OSD MLP discussed in Chapter Six is to encourage military law officers to stay within the production line of their professional occupations by making it possible for such officers to reach higher salary grades without being in management positions.⁸⁴ This means that adequate remuneration of military judges may partially address the above-mentioned concern.

Secondly, tenure until the age of retirement may make it difficult to manage appointees who turn out to be poor judges; especially if the appointment process is not rigorous or where the pool of quality candidates is very limited.

The third concern is that this may well be a move too radical for the military at this point in time considering the fact that a fixed-term assignment was traditionally not even part of the military justice system. It would not be farfetched to argue that the system has probably not yet evolved into a situation where tenure until the age of retirement may be implemented feasibly, at least for now. Indeed, we may well be on our way towards tenure until the age of retirement sometime in the future as judicial independence is an evolving concept. The final, and probably the most important point is that tenure until the age of retirement by its very nature unreasonably slows down the ascendance of fresh ideas in any judiciary—something which is useful from time to time. This brings me to some discussion of fixed-tenure, which Canada, until recently, offered to its military judges, which India offers to a section of its military judges as already discussed, and of course, South Africa, to some extent.

Military judges in Canada used to be appointed for a fixed-term of five years renewable for a further five-year term upon request and recommendation of an independent Renewal Committee. This situation

⁸⁴ On file with the author.

prevailed until 2011. It was the practice and the policy of the Government of Canada to renew appointments.⁸⁵ The strengthening of the independence of military judges in Canada was the consequence of *R. v. G  n  reux*.⁸⁶ In that case, the Canadian Supreme Court held that military judges did not have sufficient security of tenure as they were appointed on a case by case basis. This is now all history as Canada has joined New Zealand and the United Kingdom in offering tenure until the age of retirement, albeit with a lower retirement age and also that military judges there are still uniformed.

In Chapters Four and Six it was observed that fixed judicial appointment is generally consistent with judicial independence. However, some authorities show that there are fundamental challenges associated with this mode of appointment. These challenges relate to the length of the term, and the renewability of the same. Lederer and Zelif capture the limited effect of a fixed-term of office on the independence of military judges as follows:

Unless a military judge is serving the last assignment of her or his career, fixed tenure is of little consequence. The independence problem stems from concern that a military judge's decision will be influenced by his or her interest in future assignment and promotion. On conclusion of a fixed tenure, the judge is once again in competition with all other officers of similar grade for promotions and better assignments. The degree of protection afforded a judge by fixed tenure is thus de minimis.⁸⁷

Similar sentiments have been expressed by Stevenson J in *R. v. G  n  reux* that as the tenured term draws to a close, it may be in the interest of military judges wishing to secure re-appointment to please the executive.⁸⁸ These sentiments are persuasive. In my view, this means fixed tenure can only be more effective under the following conditions: when the incumbents would not be continuing the military upon completion of a term or when such terms are renewable through a truly independent process such as a properly staffed Committee or Commission, and when military judges are not eligible for promotion which is subject to the powers that be during their

⁸⁵ Department of National Defence, 'Report on the Compensation of Military Judges' (2004) http://www.forces.gc.ca/site/reports/mjcc04/index_e.asp [accessed on 30 March 2006].

⁸⁶ Note 38 above.

⁸⁷ Note 38 above, 49.

⁸⁸ Note 58 above, 317.

tenure. Before the 2011 amendment, s 165.21(3) of the National Defence Act (Canada) made provision for a Renewal Committee which recommended renewals of term of office of military judges in that country.

The above discussion shows that there are at least three models regarding tenure of military judges in the six countries considered. These can be described as follows: lack of fixed tenure (United States and Australia (only for now)); fixed tenure (India); and tenure until the age of retirement (United Kingdom; Canada; and New Zealand). The model prevailing in the United States and Australia does not support judicial independence despite its strange approval by the United States Supreme Court in *Weiss*. The choice therefore is between tenure until the age of retirement and tenure for a fixed period. Trends among the majority of the countries studied support both models; but there is a very strong movement towards granting tenure until retirement age. Finally, relevant international law and the South African Constitution support either of these models.

Proposal for tenure of South African military judges

It is proposed that South Africa should take the cue from the United Kingdom, New Zealand, and more recently Canada and grant tenure until the retirement age of 60 years. I propose retirement at 60 years of age because military judges are sometimes deployed beyond the borders of the Republic, and as people get older, their ability to handle tough conditions such as war or war like environments deteriorate naturally. An outline of the proposal follows.

- Tenure until retirement age is justified for military judges because they compare closely with magistrates, who hold tenure until the age of retirement, currently set at 65 years. However, I have, in the past argued for a fixed and renewable term of office of ten years for two reasons. The previously suggested period gives judges enough time to settle in their positions, and to develop their judicial skills without having to worry about

the next career move for a considerable period of time.⁸⁹ Appointment for a fixed term also ensures acceptability of military judges within the wider scheme of things because most statutory appointments in the Defence Force are for a fixed period.⁹⁰ While there is generally no problem with a fixed term of office, the recent ruling of the Constitutional Court in *Justice Alliance of South Africa v President of the Republic of South Africa and Others*⁹¹ suggests, however, that a renewable term of office is constitutionally questionable. In this connection, the Court stated the following:

It is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal.⁹² (footnotes omitted)

Although these remarks were made in the context of non-renewability of a term of office of a Constitutional Court judge, there is no reason to suggest that they have no general application to the judiciary as a whole. Moreover, in South Africa, no judicial officers hold office for a renewable term of office other than military judicial officers. It is either that they hold office until the age of retirement⁹³ or for a fixed and non-renewable term.⁹⁴

⁸⁹ The range for a fixed tenure of military judges was previously between two, five and ten years. It is currently two years in South Africa (as a matter of general practice), was five years in Canada, and until recently ten years in Australia.

⁹⁰ Similarly, this factor played a role in fixing the tenure of Australian military judges at ten years. See Jones (note 66 above) 94-95 alluding to this.

⁹¹ 2011 (5) SA 388 CC.

⁹² *Ibid* para 73.

⁹³ For example, s 13(1) of the Magistrates Act 90 of 1993 provides that '[a] magistrate shall vacate his or her office on attaining the age of 65 years...'. Furthermore, s 3(2)(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 provides that '[a] judge who holds office in a permanent capacity-

(a) shall, subject to the provisions of s 4 (4), be discharged from active service as a judge on the date on which he or she attains the age of 70 years...' The Court Martial Appeal Court of Canada decision in *R. v. Leblanc* 2011 CMAC 2 provides very strong authority for this proposal. Delivering judgment in the context of Canadian military judges the Letourneau J.A. held that '[i]t seems inconceivable to me, and I say this with all due respect for the contrary view, that military judges, who exercise the same functions and have essentially the same powers as superior and provincial courts of criminal jurisdiction, should be subject to the whims, the unknowns, the uncertainty and anxiety of having their positions come up for renewal every five years. In fact, they are the only judges with such jurisdiction to be subject to short, renewable terms of employment.' As shown above, the same comments could be made about military judges in South Africa and there is no longer justification for offering them lesser measures of judicial independence.

- The appointment of military judges should be carried out by a truly independent structure⁹⁵ that could be styled as the Military Judicial Commission (Commission), for example. The Ministerial Task Team correctly suggests that such a structure should follow a transparent and accountable process.⁹⁶ The Commission must be diverse and balanced in its composition. It should be representative of various interests including the military judiciary; the military command; the Parliament; the Ministry of Defence and possibly scholars in the field of military law or judicial independence. Most importantly, it should not be dominated by any specific interest group so that it would not be biased in its approach, particularly to the executive or the military command.⁹⁷
- The appointment could be subject to a probationary period⁹⁸ of three years because tenure until retirement is a major step and unprecedented for military judges in South Africa.⁹⁹ As there is no guarantee of the quality and suitability of appointees in any environment, the probationary period could serve as a screening mechanism if taken seriously. The appointment and confirmation of candidates must be done by the independent Commission proposed above and an objective criterion for confirmation will need to be

⁹⁴ For example, s 176(1) provides that '[a] Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first...'.
⁹⁵ Ministerial Task Team Report (2004) 35.

⁹⁶ *Ibid.*

⁹⁷ The South African Judicial Service Commission is widely perceived by some as biased because it is a body whose membership is dominated by politicians or political appointees. See s 178 of the Constitution. For some critical and interesting reflection on aspects of the JSC see Hugh Corder 'Appointment, Discipline and Removal of Judges in South Africa' in H.P. Lee (ed.) *Judiciaries in Comparative Perspective* (2011). For a discussion of the performance of the JSC during the early stages of its existence see Kate Malleson 'Assessing the performance of the Judicial Service Commission' (1999) Vol. 116(1) *South African Law Journal* 36. Furthermore, Kate Malleson 'Assessing the strengths and weaknesses of a Judicial Appointment Commission' May (1998) *Amicus Curiae* 16, commenting on the possibility of establishing a judicial appointment commission for the United Kingdom more than a decade ago, cautioned that '[t]he use of a commission is not a panacea...'. However, Malleson generally concludes in favour of establishing such commissions. More can be said on this topic but for pragmatic reasons, this study will not go into great detail on this.

⁹⁸ This concept has been proposed by Lederer and Zelif (note 38 above) 56, for the United States military judges to ensure that tenure is only offered to candidates of highest quality. However, they recommend fixed tenure of 30 years which effectively would be tenure until the age of retirement because most military judges would usually be over the age of 30 years upon appointment to a military bench.

⁹⁹ This is the period recommended by Lederer and Zelif regarding United States military judges being offered fixed-term tenure of 30 years.

set. However, some may argue that probation is subject to same problems as fixed term, but in this case, potential problems could be alleviated by ensuring that confirmation is done by a truly independent structure suggested above. That said, the real danger with appointments subject to probation lies in the fact that it might discourage some candidates from availing themselves to become military judicial officers for fear that the appointment may not be confirmed. This means that making judicial appointments subject to probation must be viewed with great caution as it may produce unintended consequences. Others may argue (perhaps rightly) that the best option is to have a rigorous selection and appointment process to ensure that the best possible candidates are appointed and that newly appointed judges should be given high quality judicial training prior to occupying their seats on the military bench and thereby dispensing with the need for probation.

- Finally, military judges should not be subject to any non-judicial transfer during their tenure of office in order to ensure non-interference by the executive or the military command. They should also not be eligible for promotion as this can be a negative source of influence on their independence. Instead, military judges who aspire for senior positions within the judiciary should compete for available vacancies as is generally the case in the civilian judiciary. Judges at the CMJ level would compete for posts at CSMJ and those at CSMJ for posts at the CMA. Due to their ineligibility for promotion, members of the CMJ could be appointed at the level of Lieutenant-Colonel as opposed to Major or Lieutenant-Commander (in the case of the Navy) and members of the CSMJ could be left at Colonel's level. The suggested military ranks are relatively senior among officers' ranks. This, together with adequate remuneration, would make a career within the military judiciary attractive.

7.3.3 How to address the financial security of military judges?

As discussed in Chapter Four, basic financial security entails (a) adequate remuneration;¹⁰⁰ (b) safeguards to avoid arbitrary reduction of salaries of judicial officers;¹⁰¹ and (c) an assurance that judicial officers should not be put in a position to engage in negotiations with the executive over their salaries because they are not employees, and cannot resort to industrial action to advance their interests in their conditions of service.¹⁰² Chapter Six demonstrates that the current scheme of remuneration, as a matter of principle and practice, meets none of those requirements. A discussion on how the concerns identified in that chapter could be fixed follows below.

(a) Who should determine the remuneration of military judges?

As discussed already, the compensation of magistrates and civilian judges is maintained by an independent structure—the Independent Commission for the Remuneration of Public Office Bearers¹⁰³ established in terms of s 219 of the Constitution and the Independent Commission for the Remuneration of Public Office-bearers Act.¹⁰⁴ Although s 219 does not mention magistrates as public office bearers, s 1 of the legislation establishing the Commission includes magistrates in the definition of public office bearers.¹⁰⁵ Let us look at how the five comparative countries have dealt with the question of remuneration of their military judges.¹⁰⁶

¹⁰⁰ *Van Rooyen v The State and Others* (note 1 above) para 138.

¹⁰¹ *Ibid* para 149.

¹⁰² *Ibid* para 139.

¹⁰³ The Commission consists of seven members appointed by the President in terms of s 3 of the Act. At the time of writing, the Chairperson of the Commission was Judge Willie Seriti.

¹⁰⁴ No. 92 of 1997.

¹⁰⁵ The original version of the Act did not include magistrates as public office bearers but was later amended to include them.

¹⁰⁶ The United States will not be considered here because it does not have full-time military judges.

In Australia, the remuneration of military judges used to be set by the Commonwealth Remuneration Tribunal when the new system was still up and running.¹⁰⁷ In the proposed system, the position has not changed.¹⁰⁸ That move amounted to integration of military judges into the mainstream on the question of remuneration. Salaries and allowances of judge advocates in the United Kingdom are determined by the Lord Chancellor¹⁰⁹ with the approval of the Treasury.¹¹⁰ In Canada, the remuneration of military judges is regularly reviewed by a Compensation Committee.¹¹¹ More recently, New Zealand has passed legislation which requires the salaries of military judges to be paid out of public money at a rate determined by the Remuneration Authority.¹¹² The same institution determines salaries of other judges in New Zealand. This, too, is an integration of military judges into the mainstream regarding their remuneration. On the issue of reduction of salaries, of the six countries examined, New Zealand and India are the only countries with legislative provisions which specifically bar the reduction of salaries of military judges.¹¹³

The above survey shows an emerging trend to establish special measures to deal with financial security of military judges. Military judges are increasingly receiving special attention. I would argue that this is both appropriate and necessary for all the reasons outlined above. Most countries seem to favour integrating military judges into existing mainstream structures with respect to the determination of their salaries. Canada is the only country with a structure created specifically to look into the compensation of military judges.

¹⁰⁷ That is the same structure which determines remuneration for justices in Chapter III courts in that country.

¹⁰⁸ See s 20 of the Military Court of Australia Bill.

¹⁰⁹ The Lord Chancellor is a senior functionary in Great Britain responsible for the efficient functioning and independence of the courts.

¹¹⁰ Section 33 of Courts-Martial (Appeals) Act 1951.

¹¹¹ Section 165.22(2) of the National Defence Act 1985.

¹¹² Established in terms of the Remuneration Authority Act 1977.

¹¹³ See s 20(3) of the Court Martial Act 2007 and s 10 of The Armed Forces Tribunal Act 2007 respectively.

(b) Options on who should determine salaries of military judges in South Africa

It was argued in Chapters Four and Six that the law envisages special measures regarding the remuneration of all judicial officers. In my view, there are three possible options that could be followed on who should determine the remuneration of military judges.

The first option could be to integrate military judges into mainstream civilian structures on the issue of remuneration. They could be included in the work of the Independent Commission for the Remuneration of Public Office Bearers. This would obviously require amending the definition of a public office bearer in s 3 of the Independent Commission for the Remuneration of Public Office-bearers Act to include military judges as was done in the case of magistrates. Military judges are judicial officers, there should not be any legal difficulty in accepting them as public office bearers. Integrating military judges into mainstream civilian structures is supported by foreign trends in the area of compensation of military judges as seen in Australia and New Zealand. The Commission on the Remuneration of Public Office Bearers has over the years developed expertise in determining salaries of judicial officers. This move might help in lifting the status of military judges and the strengthening of their financial security. However, a possible difficulty with this option is that military judges and their work are hardly known in civilian settings due to the historical separate existence of the military justice system. The Commission will need to study the role of military judges and their unique situation in order to come up with appropriate recommendations with respect to their compensation. This is not an impossible task although it may initially require a considerable effort. It is hoped that the work done in this thesis could assist in that process.

The second option could be the newly established Defence Force Service Commission.¹¹⁴ The Commission's role would be annually to make recommendations to the Minister of Defence and Military Veterans concerning the salaries, service benefits and other conditions of service of members of the Defence Force. It would also be empowered to conduct research on the conditions of service and consider any representations made to it.

Ordinarily, the Commission would also be looking into the salaries of military law officers, and by extension military judges; but it would be unlikely to address the concerns raised in Chapter Six if it looks at military judges as mere military law officers instead of viewing them as judicial officers. Nevertheless, there are two concerns which suggest that the envisaged Commission may not be a suitable vehicle to deal with the financial security of military judges. The first is that the Commission would, in all likelihood, be overwhelmed in its work given the size of the Defence Force and the diverse interests of its members. It could be expected that the financial security of military judges would be over-shadowed by many other competing interests. The second concern is its independence and the force of its recommendations. The Commission consists of no fewer than eight members all of whom are appointed by the Minister of Defence. Its recommendations would have to be approved by the Minister of Defence acting in consultation with the Minister of Finance, and agreed upon in the Military Bargaining Council (MBC).¹¹⁵ If no agreement can be reached in the MBC, the Minister 'may, after consideration of any advisory report by the Military Arbitration Board and with the approval of the Minister of Finance, determine the pay, salaries and entitlements...' of members of the Defence Force.¹¹⁶ The inappropriateness of the MBC as a vehicle to determine salaries of military judges was discussed in Chapter Six, and will not be repeated here. Furthermore, it is clear that the force of the

¹¹⁴ Established through the Defence Amendment Act 22 of 2010, amending s 55 of the Defence Act 2002.

¹¹⁵ Section 5(1) of the Defence Amendment Act 2010.

¹¹⁶ Section 55(3) of the Defence Act.

recommendations of the envisaged Commission would be weak as this would entirely depend on the take of the Minister of Defence in the first place, and the Minister of Finance in the second place.

The third and probably the most viable option to determine the remuneration of military judges could be the Military Judicial Commission already proposed and discussed in this chapter. That option is also supported by foreign precedent as shown in the context of Canada above. The Commission could be modelled on the South African Magistrates Commission.¹¹⁷ It would be more useful if it is also empowered, by law, to conduct research on the working conditions of military judges and make policy recommendations. Most importantly, the annual recommendations of the commission concerning the remuneration of military judges should be submitted to Parliament for approval, not to the Minister of Defence as this may mean that military judges would be at the mercy of the executive regarding their remuneration. The implication is that military judges would have to be paid from monies appropriated by Parliament instead of the coffers of the Department of Defence.¹¹⁸ The Military Judicial Commission could serve as a filter between the military judiciary and the SANDF or the Parliament with regard to remuneration of military judges and that would enhance the independence and dignity of military courts.¹¹⁹ It is possible to

¹¹⁷ In this connection, the Magistrates Act, 90 of 1993 s 12(1)(a) allows the Minister of Justice to determine salaries in consultation with the Commission. The relationship between this and recommendations made by the Commission for Public Office Bearers is not entirely clear.

¹¹⁸ Similarly, the recommendations of the Independent Commission on the Remuneration of Public Office Bearers must be submitted to Parliament before their publication in the Government Gazette (see s 8(5) of the relevant Act). This is in line with the *UN Principles* which require that the law should secure adequate remuneration of judicial officers. This presupposes the involvement of the legislature in setting the salaries of judicial officers.

¹¹⁹ By way of emphasis, in *Reference re: Public Sector Pay Reduction Act (PEI)*, Attorney General of Canada et al, Interveners; *Reference re: Independence of Judges of Provincial Court, Prince Edward Island, Provincial Court Act and Public Sector Pay Reduction Act*; Attorney General of Canada et al, Interveners (1997) 150 DLR (4th) 577 the Canadian Supreme Court held that 'independent commissions were required to improve the process designed to ensure judicial independence but that the commissions' recommendations need not be binding. These commissions were intended to remove the amount of judges' remuneration from the political sphere and to avoid confrontation between governments and the judiciary...'

However, it must be noted that in *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), paras 59 and 124, it was held that there is no obligation

structure such a body in such a way that it would not cost much to the State. After all, judicial independence does not come for free. It requires political will and a fair level of commitment of resources.

Finally, encouragement to carry out the above suggestions should be drawn from the fact that military judges are judicial officers and therefore public office bearers. Their uniqueness should not overshadow their actual status.

(c) What factors should guide the remuneration of military judges?

Section 165 of the Constitution does not explain how to determine appropriate levels of remuneration of judicial officers. It has already been noted in Chapter Four that the Constitutional Court has acknowledged this to be a difficult area for which there are no easy answers.¹²⁰ What is known is that the remuneration must be adequate, and the *UN Principles* require that the law should secure adequate remuneration of judicial officers. It is also known that, currently, there is no military judicial salary—in other words military judges are not recognised as judicial officers for purposes of remuneration.

The Independent Commission for the Remuneration of Public Office Bearers is required to take the following factors into account when determining appropriate salary levels for different office bearers including judicial officers:

When making recommendations referred to in subsection (4) the Commission must take the following factors into account:

- (i) The role, status, duties, functions and responsibilities of the office-bearers concerned;
- (ii) the affordability of different levels of remuneration of public office bearers;

to establish independent structures to serve as a filter between the judiciary and the executive; and that this is a matter of political choice, not mandatory for securing judicial independence. On the other hand, the Constitutional Court recognises that such structures play a crucial role in the determination of salaries and conditions of service for judicial officers: *Van Rooyen v The State* (note 1 above) paras 145-148.

¹²⁰ *Van Rooyen v The State* *ibid* para 138.

- (iii) current principles and levels of remuneration, particularly in respect of organs of state, and in society generally;
- (iv) inflationary increases;
- (v) the available resources of the state; and
- (vi) any other factor which, in the opinion of the said Commission, is relevant.¹²¹

The above factors are quite interesting because they are comprehensive, capable of flexible application to various office bearers, and would in all likelihood ensure that salaries of judicial officers are adequate if applied reasonably. Factor (i) is the crucial missing link with regard to the remuneration of military judges as their role, status, duties, functions and responsibilities as judicial officers are currently not taken into account. Factors (ii) – (v) are generic and usually considered in the ordinary course of events.

Switching to comparative analysis on the issue, Canada has evolved to become a model in structuring the remuneration of military judges. As already pointed out, it has established a special and independent Committee whose purpose is to enquire into the adequacy of the remuneration of military judges.¹²² The Committee has conducted studies and compiled reports on the issue. In its enquiries, that Committee must be guided by the following factors:

- (a) the prevailing economic conditions in Canada, including the cost of living and the overall economic and current financial position of the federal government;
- (b) the role of financial security of military judges in ensuring judicial independence
- (c) the need to attract outstanding officers as military judges, and
- (d) any other objective criteria that the Commission considers relevant.¹²³

Each of these factors is discussed by the Committee in its 2008 Report. Countries which are keen to improve and understand the financial security of military judges could find the work being carried out in Canada to be instructive. Factor (b) is very important because it goes to the heart of the

¹²¹ Section 8(6) of the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997.

¹²² The Military Judges Compensation Committee.

¹²³ See Report of the Military Judges Compensation Committee September 2008 (note 20 above) 1.

issue. The Committee's role is to determine an appropriate level of remuneration of military judges based on the above factors.¹²⁴ Its aim is neither to determine the minimum remuneration nor to achieve maximal conditions.¹²⁵ Having assessed the factors provided for in the Remuneration of Public Office-bearers Act and the Canadian approach on the matter, it is proposed that the appropriate remuneration of South African military judges should be guided by the following six factors:

- the role, status, duties, functions and responsibilities of military judges including their unique circumstances;¹²⁶
- the status of military courts within the South African judicial system;
- the role of financial security of military judges in ensuring judicial independence;
- the available resources of the state taking into account the prevailing economic conditions;
- inflation, and
- the need to attract outstanding officers as military judges.

These factors could go a long way in determining an appropriate level of remuneration of military judges.

(d) What is the appropriate level of remuneration of military judges? A tentative proposal

It is probably ambitious to attempt to answer this question within the scope of this study but it is necessary to do so because a decent level of remuneration is an important element of judicial independence. Bearing that difficulty in mind, what follows is an attempt to answer the question in a principled and tentative way, without necessarily considering all the

¹²⁴ See *ibid* 6-7. For the workings of the Committee see art. 204.23 to 204.27 of the Queens Regulations and Orders.

¹²⁵ See *ibid*.

¹²⁶ The assessment of this factor should also include the fact that military judges are required to travel extensively, sometimes even beyond the borders of the Republic of South Africa.

pragmatic aspects of the question but primarily guided by the factors proposed above.

The role, status, duties, functions and responsibilities of military judges are well known. Their primary role is to preside over military courts. The jurisdiction of those courts was explained in Chapter Two and also in this Chapter. Similarly, the status of military courts is also illustrated in this Chapter. Table A in particular, and to some extent parts of Chapter Two show the place of military courts within the South African judicial system. In general, they can be regarded as courts of status similar to that of magistrates' courts as provided for in s 166(e) of the Constitution (except the CMA). The role of financial security of military judges in ensuring judicial independence was explained in Chapters Four and Six, that it safeguards the individual judge's freedom from outside influence. Taking into account all these factors and the fact that magistrates' courts provide an appropriate comparator group for military judges as shown in Tables C and D, it is suggested that the salaries of military judges should mirror those of magistrates. This means that, in line with the analysis of Tables C and D, salaries of military judges (CMJ) would reflect those of magistrates presiding over district magistrates' courts, while those of senior military judges would mirror those of regional magistrates' courts. By way of emphasis, as at September 2011, a magistrate's remuneration was set at R671,219 compared to the range of R188, 736¹²⁷ and R309, 216 per annum for military judges depending on the exact years of service and experience, qualifications, and performance. On the other hand, it has already been noted that the total remuneration package for senior magistrates is R738, 262, compared to an all inclusive package of between R434,451 and R527,232 for a senior military judge with legal experience of between 11 and

¹²⁷ For comparison purposes, it is an equivalent of about \$23.592 per annum. At this level, the package is not all inclusive—meaning that it excludes benefits such as medical aid and housing allowance. These are difficult to quantify, suffice to say that the military offers the most generous medical benefits than any State department. The current (2012-2014) housing allowance for most state departments is R900 per month. As already pointed out, the accuracy of the figures presented here may be disputed given the varied nature of the application of the OSD MLP in relation to specific individuals. However, the range is generally accurate in terms of the OSD MLP on file with the author.

13 years. The disparity between military judges and magistrates is huge, at least according to these figures. It is unlikely that the military would be able to attract outstanding judges with the current salary package. The suggested level of remuneration would undoubtedly ensure that military judges are financially secure, and that outstanding officers are attracted to the military bench.

Affordability is unlikely to be a big issue given that the size of the military judiciary is very small. As at 31 March 2004, there were only 19 full-time military judges, four of whom were senior military judges.¹²⁸ Even if that number may have doubled since 2004, it would still be relatively small. Moreover, the cost of salaries of military judges is negligible when compared with the number of magistrates in South Africa. As at mid - 2008, there were 1 830 magistrates in South Africa.¹²⁹ Certainly, South Africa cannot fail to provide financial security to its military judges even if the matter is viewed from an unfavourable economic conditions perspective.

7.3.4 The appropriate procedure for the removal of military judges

Two areas of concern relating to the removal of military judges were established in Chapter Six. The first relates to the lack of appropriate procedure for their removal as required in terms of s 174(7) of the Constitution and the *UN Basic Principles on the Independence of the Judiciary* which require that the judicial officer must have the right to a fair hearing. The second relates to the principle established by the Constitutional Court in *Van Rooyen*—that a finding as to whether or not a judicial officer is guilty of misconduct should be made by a judicial officer.¹³⁰ The current mechanism for the removal of military judges as provided for in the Military Discipline Act meets none of those conditions. As noted in Chapter Six, military judges may be removed by the Minister of Defence on

¹²⁸ Presentation of the Military Legal Services Division www.pmg.org.za/docs/2004/appendices/040907services.ppt [accessed on 06 June 2010].

¹²⁹ www.info.gov.za/aboutgovt/justice/courts.htm [accessed on 06 June 2010].

¹³⁰ *Van Rooyen v The State* (note 1 above) para 195.

the recommendation of the AG. No procedure is spelt out as to the process that should be followed, which, undesirably, leaves the matter open ended.

South African Magistrates have elaborate removal procedures which involve the Magistrates' Commission, the Minister of Justice, and the Parliament. The key elements of that procedure as provided for in the Magistrates Act¹³¹ are as follows: investigation of complaints before any action is taken,¹³² fair hearing,¹³³ independence of the process, removal or suspension of a judicial officer by the Minister of Justice upon recommendation by the Commission, and parliamentary involvement.¹³⁴

As can be seen from the above, the procedure concerning the removal or suspension of magistrates involves several parties and various processes when contrasted with that of military judges which involves only two parties, none of whom are judicial officers. The relevant legislation does not even enjoin both the Minister and the AG to follow a specific procedure. Nevertheless, the removal of military judges is subject to constitutional control, which would entail affording the relevant military judge a fair hearing before any action is taken.¹³⁵ That said, spelling out the procedure in the relevant legislation is fundamental in order to avoid any confusion. This is particularly important in the case of military judges because most things in the military are hardly transparent, and rarely the subject of public scrutiny.

Procedures similar to those of the removal of magistrates could be adopted for military judges, and perhaps procedures in other comparable

¹³¹ Act 90 of 1993.

¹³² *Ibid* section 13(3)(a)(ii).

¹³³ *Ibid* section 13(3)(a)(i).

¹³⁴ *Ibid* section 13. The provisions of that section require the Minister to table a report before Parliament on the suspension or removal of a magistrate after which the parliament must pass a resolution on whether or not the suspension or the removal of a magistrate is confirmed.

¹³⁵ That assertion is supported by s 174(7) of the Constitution which provides that '...an Act of Parliament...must ensure that the...the dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.' Removing or disciplining military judges without affording them a fair hearing will prejudice them.

jurisdictions could be considered as well. The proposed Military Judicial Commission could play the role which is played by the Magistrates Commission in relation to magistrates. The involvement of Parliament is also desirable. The relevant parliamentary structure would be the Portfolio Committee on Defence or the Joint Standing Committee on Defence. All in all the process will include the following parties: the Military Judicial Commission, the Minister of Defence, and Parliament's Portfolio Committee on Defence.

In this part of the thesis comparative analysis was not offered because the law is fairly clear on the subject, and most importantly, South Africa offers sufficient examples of procedures for removal of judicial officers in the civilian set up which could be adapted to the military context.

This concludes the discussion of conditions of judicial independence which protect judicial officers as individuals. It has been noted already that those conditions alone have been held not to guarantee judicial independence if the courts themselves are not independent of the other branches of government.¹³⁶ The discussion which follows will focus on how to remedy the concerns identified regarding the institutional independence and impartiality of military courts.

7.3.5 The appropriate design for institutional independence and impartiality of military courts¹³⁷

In this part of the chapter, challenges of institutional independence of military courts are addressed.

¹³⁶ *R v Valente* (1985) 24 DLR (4th) 161 (SCC) para 20.

¹³⁷ Independence and impartiality are jointly discussed here because the two are closely linked and often referred to together in many legal instruments (including the South African Constitution) and precedents – as observed in chapters four and six.

(a) Administrative independence of military courts in comparative military justice

I begin by restating the institutional independence problems of military courts for ease of reference. The AG sits at the apex of the military justice system and is responsible for the overall management of the system. His or her local representative plans and schedules the availability of military judges and military assessors in consultation with the Director: Military Judges. Furthermore, the AG or his or her local representative is involved in the rating and promotion of military judges. Most importantly, he or she is responsible for most command and control aspects relating to military courts, military judges and all staff associated with the running of the courts.

Adjutants General/Judge Advocates General in the majority of the countries studied play a role similar to that of the AG in South Africa. For example, in Canada, the Judge Advocate General has the superintendence of the administration of military justice in the Canadian Forces.¹³⁸ Similarly, the Judge Advocate General or his senior officers in the United States are required to ‘make frequent inspections in the field in supervision of the administration of military justice.’¹³⁹ He acts as a principal adviser to the armed force,¹⁴⁰ assigns military judges for duty, and judges generally fall under his command and control.¹⁴¹ In addition, all other judge advocates including prosecutors fall under him as well. Some, correctly, see the roles of the Judge Advocate General to be potentially conflicting and contradictory for obvious reasons; that he advises the command on military criminal law matters, controls all judge advocates including prosecutors, and that

¹³⁸ Section 9.2(1) of the National Defence Act. As is the case in the United States, the Judge Advocate General also acts as legal adviser to the Governor-General, the Minister of Defence, the Department of Defence, and the Canadian Forces in matters relating to military law (see s 9.1 of the National Defence Act 1985).

¹³⁹ See s 806. Art 6(a) of the UCMJ.

¹⁴⁰ In South Africa, the AG used to be the chief legal adviser to the SANDF. However, the Military Legal Services Division was recently restructured and the AG no longer plays that role—now only confined to the military justice system. The legal advice section of the SANDF has been transferred to the defence secretariat – the civilian component of the SANDF.

¹⁴¹ See Lederer and Zelff (note 38 above) 39-42 describing and discussing the role of the Judge Advocate General in the United States.

military judges fall under his control.¹⁴² However the United States Supreme Court stated the following on the role of the Judge Advocate General:

[b]y placing judges under the control of Judge Advocate General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.¹⁴³

As already stated, the decision in *Weiss v. United States* is poorly reasoned because it relies too much on the historical outlook of military courts despite the fact that those courts have evolved and now look different. The United Kingdom is interesting because the Judge Advocate General is more or less Chief Military Judge, and does not get involved with prosecution services.¹⁴⁴ In New Zealand, what used to be the Judge Advocate General is now called the Chief Judge of Court-Martial following reforms in Australia, Canada and the United Kingdom.¹⁴⁵ There is now a clear separation between the military judiciary and military prosecutorial services.

However, it is important to point out that, despite the concerns highlighted the South African model still looks acceptable because it has a Chief Military Judge or Director: Military Judges whose presence enhances the structural independence of military courts. Canada, the United Kingdom and New Zealand are similar to South Africa in the sense that the notion of a Chief Military Judge exists in all three except that the Chief Military Judge is a civilian in the case of the United Kingdom and also that he or she is called Judge Advocate General.¹⁴⁶ In fact both New Zealand and South Africa appeared to have been influenced by Canada in this respect, that country having introduced the notion in 1998, South Africa in 1999, and New Zealand in 2007.

¹⁴² See *ibid* 40.

¹⁴³ *Weiss v. United States* (note 41 above).

¹⁴⁴ Section 364 of the Armed Forces Act 2006 makes provision for Director of Service Prosecutions.

¹⁴⁵ Griggs (note 56 above) 81. See also s 12 of Court Martial Act 2007.

¹⁴⁶ Although the United States is more of a mixed bag, each arm of service has a Chief Trial Judge by way of regulation.

Nonetheless, there is one important distinction between South Africa, and Canada, the United Kingdom, and New Zealand with respect to institutional administrative independence of military courts. The AG in South Africa is primarily responsible for all matters relating to the administration of military courts. In the above-mentioned countries, the administration of the courts is the statutory responsibility of the registrar or court administration officer who functions under the authority of the chief military judge.¹⁴⁷ In New Zealand, the registrar is appointed by the Chief Military Judge.¹⁴⁸

In Australia, the Chief Justice of the Military Court of Australia will solely be responsible for the management of the court assisted by the registrar who will function under the direction of the chief justice.¹⁴⁹ In fact all the administrative staff attached to the court will function under the Chief Justice, including ADF members.¹⁵⁰ This is an interesting model and probably the strongest outlined thus far. However, the model must be viewed in the context within which the Military Court of Australia was created as per *Lane v Morrison* discussed already.

What can be learnt from the above arrangements is that there is a move to strengthen the institutional administrative independence of military courts through court registrars who function under chief military judges. In other words, the administrative powers of military judges are increasing. These developments augur well for the judicial independence of military courts. If these signs are anything to go by, we are possibly heading to an era where Adjutants General would become redundant within military justice systems.

¹⁴⁷ Canada: see s 165.18 of the National Defence Act 1985 (but the post was only created in 1998), United Kingdom: see s 362 of the Armed Forces Act 2006, New Zealand: see s 79 of the Court Martial Act 2007.

¹⁴⁸ Section 79(1) of the Court Martial Act 2007.

¹⁴⁹ Section 29 of the Military Court of Australia Bill.

¹⁵⁰ *Ibid* s 32.

(b) Proposals for enhancing administrative institutional independence of military courts

Firstly, the AG should be stripped of his powers relating to the administration of military courts. The powers that should not be exercised by the AG are as follows: planning and scheduling the availability of military judges and military assessors, allocation of court rooms, and the direction of administrative staff engaged in carrying those functions. Those should be exercised by the Chief Military Judge¹⁵¹ or any senior judge nominated by the Chief Military Judge assisted by a military court registrar who should preferably be appointed by the Chief Military Judge. This means that each legal satellite office would have a judge nominated by the Chief Military Judge to perform the said functions. It may very well mean that the administrative functions of military judges would increase, but this is an important step if military courts are to have institutional administrative independence. Moreover, those functions are directly related to judicial functions of judges.

Secondly, military judges should fall under the Chief Military Judge for command and control purposes to avoid the perception that they are part of the general chain of 'military' command. In practice, this would mean that aspects such as approval for leave of absence of military judges would be done by the Chief Military Judge or his or her nominee. The office of the chief military judge would run as a unit of the SANDF as is currently the case in Canada, and of which the Chief Military Judge is the commander.¹⁵²

The separation of powers does not necessarily mean that cooperation between the office of the chief military judge and the AG is not required. There would still be a fair amount of co-operation required between the two offices as long as the two respect each other's functions and powers. The detail of the modalities of co-operation is a matter which should be left for

¹⁵¹ Except the assignment of military assessors, it is suggested that that should be the function of the registrar under the general guidance of the Chief Military Judge. This is generally the case in New Zealand (see s 21(4) of the Court-Martial Act 2007).

¹⁵² Report on the Military Judges Compensation Committee (note 20 above) 5.

legislative drafting, and lessons can be drawn from the model proposed in Australia with respect to the envisaged cooperation between the Chief Justice of Military Court of Australia and the ADF.¹⁵³

Finally, it is worth pointing out that the policy direction of the South African civilian court context supports the idea that judges should have full administrative control over courts. Recently, the Office of the Chief Justice (OCJ) was established as an independent national department falling under the Chief Justice in order to strengthen administrative institutional independence of the judiciary.¹⁵⁴ With the establishment of the OCJ, it can be expected that the Department of Justice and Constitutional Development, as an arm of the executive, will lose most of its administrative powers over courts in South Africa. This will enhance the institutional independence of the judiciary.

(c) Addressing perceived partiality of military courts

The extent to which military judges can be perceived to be impartial was discussed in Chapter Six, mainly relating to their attachment to the SANDF and service in uniform. Different approaches could be followed to address the concerns. The Ministerial Task Team grappled with the issue, and recommended that the Court of Military Judge and the Court of Senior Military Judge should be chaired by a civilian magistrate or retired civilian magistrate who will bring with them the experience of institutional independence from civilian courts. Of the six countries studied, only the United Kingdom¹⁵⁵ and New Zealand provide precedent for the suggestion of the Ministerial Task Team.¹⁵⁶ Similarly, Australia would most likely be part of that group soon due to its peculiar circumstances arising from *Lane v*

¹⁵³ See in particular s 32 of the Military Court of Australia Bill.

¹⁵⁴ Proclamation No. 44 of 2010. For a passing reference to the establishment of the office see *Justice Alliance v President of the Republic of South Africa* (note 91 above) para 9.

¹⁵⁵ For an incisive discussion on civilianisation of military law in the UK in a general sense see G.R. Rubin 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' 2002 62 *Modern Law Review* 36.

¹⁵⁶ India does not feature in this group because its Armed Forces Tribunal is primarily an appellate forum.

Morrison. As already noted, in the United Kingdom, the Court-Martial consists of a civilian judge advocate and at least three but not more than five lay military members.¹⁵⁷ Similarly, New Zealand's Court-Martial consists of one civilian judge and either five military members if the proceedings relate to a serious offence; or three military members in any other case.¹⁵⁸ In both countries, military members are triers of fact while judges take responsibility for all the legal issues including the admissibility of evidence.

In *Cooper v The United Kingdom*, the Court observed that the presence of civilians in a court-martial constitutes a significant guarantee of the independence of the court-martial proceedings.¹⁵⁹ In general, there is, therefore, some scope for debate about the possibility of partial civilianisation of military courts but this must not be done to the detriment of military effectiveness.¹⁶⁰

However, civilianisation (partial or full) of military courts is not the best solution for addressing the concerns of perceived partiality and institutional independence of South African military courts. What is needed is 'civilisation'¹⁶¹ of military courts instead of their civilianisation. This means ensuring that the design of military courts is in line with principles of judicial independence along the lines suggested in this chapter. There are a

¹⁵⁷ Section 155(1) of the Armed Forces Act 2006.

¹⁵⁸ Section 21(1) of the Court Martial Act 2007.

¹⁵⁹ *Cooper v The United Kingdom* (2003) ECHR 686, para 117.

¹⁶⁰ See generally Rubin (note 155 above). However, it is important to point out that term 'civilianisation' is used *here* in the context of the Ministerial Task Team suggestion that military courts should be chaired by civilians. The term is not necessarily used in the sense discussed by Rubin (note 155 above) and Matthew Groves 'The Civilianisation of Australian Military Law' (2005) 28(2) *University of New South Wales Law Journal* 364. Groves generally refers to 'civilianisation' as 'the incorporation of civilian values into military life.' Rubin (note 155 above) 47 refers to civilianisation as 'a social and legal process of convergence between military and civilian law where no detriment to military effectiveness can be perceived...' That said, as will appear further below, the model of judicial independence proposed for South African military courts is in line with 'civilianisation' as defined by Rubin because it emphasises incorporation of civilian notions of judicial independence into military structures with no detriment to military effectiveness. The Ministerial Task Team suggested the incorporation of civilian values by means of replacing soldiers with civilians as a possible option for improving the independence of military courts.

¹⁶¹ See Draft Principles Governing the Administration of Justice through Military Tribunals para 11 E/CN.4/2006/56 published on 13 January 2006 discussed in some detail in Chapter Six.

number of factors which militate against civilianisation of military courts most of which have already been canvassed elsewhere in this chapter but will be repeated by way of emphasis.

First and foremost, as acknowledged in *Potsane*, soldiers live and work in a subculture of their own.¹⁶² This is accepted by acknowledging the constitutional validity of a separate military justice system.¹⁶³ It takes a soldier to understand properly the subculture of soldiers. Soldiers understand the pains, pressures and pleasures of military life. A civilian may fail to appreciate the dynamics of such life. He or she may end up being too strict or too lenient in some cases. The following observation by Lord Rodger of the UK's House of Lords is instructive in illuminating the value of military personnel as members of military courts:¹⁶⁴

The members of a court-martial perform a role in deciding sentence which is no part of a jury's function in the United Kingdom. I accept that, in determining sentence, the members will indeed have regard to such issues as the impact of the offence on Service morale and discipline. They will, inevitably, be more aware of these effects than a civil judge would be. Therefore, while the safeguards of the independence and impartiality of the members should mean that they approach their verdict in much the same way as jurors in a civil trial, it cannot be assumed that, when passing sentence, the court-martial will necessarily give exactly the same weight to these Service factors as would a Crown Court judge. The sentences which a court-martial passes may therefore not coincide exactly with the sentences which a civil judge would pass on the same facts.

One may add that offending soldiers are mostly likely to be more responsive when it is their fellow soldier adjudicating their fate than when it is a civilian doing so. This is because of the shared military understanding that exists among military comrades, something which only soldiers can accurately understand. Although the court in the above-mentioned case was not necessarily referring to military judges but lay members of a military court, its observations are relevant in a jurisdiction such as South Africa where military judges are uniformed and there is no compulsory system of military jury as tries of fact. This means that military judges have a crucial role to

¹⁶² 2002 (1) SA 1 (CC), para 31.

¹⁶³ *Ibid.*

¹⁶⁴ *R. v Boyd* (2002) UKHL 31, para 86.

play in bringing the necessary service knowledge to bear in the proceedings.¹⁶⁵

Secondly, s 200(1) of the Constitution requires the defence force to be structured and managed as a disciplined 'military' force. The section requires the creation of 'military' disciplinary structures. Civilianised disciplinary structures will fall foul of this constitutional requirement. Furthermore, s 11 of the Defence Act 2002 provides that the SANDF consists of the regular force and the reserve force. Civilian military judges cannot feasibly be classified as either members of the regular or reserve force in the South African context. It must also be emphasised that the military justice system is part of military capacity. It provides the military with the capacity to discipline its members. Civilianisation of military judicial services may present practical difficulties in relation to the capacity of the military to comply with its constitutional and international defence obligations.¹⁶⁶ The practical difficulty relates to the deployability of civilians in war situations. Civilians' health status, fitness and non-exposure to military life may make it difficult for them to participate in full-scale military deployments. In Australia, one of the requirements for appointment as a full-time Chief Military Judge or a military judge in the invalidated system was that the person must meet individual service deployment requirements.¹⁶⁷ It may well be possible to address concerns about deployability of civilians in some ways but it must be recognised that this may present some difficulty as argued above.

¹⁶⁵ However, see, *Grievies v The United Kingdom* (2004) 39 EHRR) 2 para 88 where the European Court was not persuaded that 'a civilian Judge Advocate would have more difficulty in following naval language or customs than a trial judge would have with a complex expert evidence in a civilian case.'

¹⁶⁶ See generally s 200(1) of the Constitution.

¹⁶⁷ See Defence Legislation Amendment Act 2006 (repealed) ss 188(AD)(d) and 188(AR)(d). By way of emphasis, it may be worth noting that judges of the anticipated civilianised military court would have to have some military background or familiarity with the military. See recent comments of the Attorney-General and the Minister of Defence outlining the plan for the new Australian military court published on 24 May 2010 www.australia.to/2010/index.php?option=com_content&view=article&id=2938:military-court-of-australia&catid=122:security&Itemid=169 [accessed on 07 June 2010] and the Military Court of Australia Bill respectively.

Thirdly, a look at the international law of armed conflict suggests a preference for military personnel to be tried in military courts.¹⁶⁸ This preference is probably informed by a particular understanding of the nature of military courts and the possible practical benefits of trial of soldiers by such courts. Furthermore, in situations of war, civilian judicial officers may sometimes run into difficulties when it comes to the process of being recognised as prisoners of war in terms of the Geneva Convention on Prisoners of War.¹⁶⁹

In Canada, as the leading country in the reform of military justice systems, there is disapproval of the civilianisation of military courts. The 2004 *Report on the Compensation of Military Judges* observes that military judges ‘must be thoroughly versed in the military life.’¹⁷⁰ The Report added that ‘[m]ilitary Judges must have military training and be aware of the importance of military discipline to the functioning of all military units.’¹⁷¹ Currently, military judges are military officers in that country.¹⁷²

It is possible to address institutional and impartiality concerns without civilianising the military judicial system. The solution to institutional and impartiality concerns regarding the military judiciary lies in *Findlay v The United Kingdom*. In this case, the Court held that a court-martial must be impartial from an objective point of view in that it must

¹⁶⁸ Geneva Convention (III) Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135, Art 84 (entered into force 21 October 1950).

¹⁶⁹ For categories of prisoners of war, see Geneva Convention (III) Relative to the Treatment of Prisoners of War, *ibid* Art 4. That article does not rule out the possibility of civilians being recognised as prisoners of war. It is not suggested that civilian military judges would not qualify as prisoners of war with respect to those categories listed in Art 4 of the relevant Geneva Convention. However, the stipulations and the open ended nature of that article may lead to complexities and delays in determining the status of civilians accompanying members of the regular armed forces. See also Peter Rowe (ed.) *The Impact of Human Rights Law on Armed Forces* (2006) 67 expressing the view that ‘...the civilian who takes an active part in hostilities, will not be entitled to prisoner of war status if captured.’ However, it is not clear whether, in his view, this will include civilians who are part of the armed forces given the complexities referred to above in relation to the Geneva Convention (III).

¹⁷⁰ Note 17 above.

¹⁷¹ *Ibid*.

¹⁷² See s 165.21(1) of Canada’s National Defence Act which provides that ‘[t]he Governor in Council may appoint *officers* who are barristers or advocates of at least ten years standing at the bar of a province to be military judges.’ (emphasis added).

offer sufficient guarantees to exclude any legitimate doubt of impartiality.¹⁷³ Fairness and independence may still be achieved by keeping the military character of military courts provided there are strong guarantees to exclude any legitimate doubt of impartiality and independence. There are clearly different models for achieving an acceptable degree of impartiality and independence of military courts. Each model has its own advantages and disadvantages. The focus should be on improving the conditions of military judges and the institutional structure of military courts along the lines suggested in this chapter rather than changing the inherent character of military courts.¹⁷⁴

7.4 Military judicial reviews: continuing a good thing without compromising the dignity of military courts

The problems with the current set up of military judicial reviews were discussed in Chapter Six. In the main, they relate to the dignity of military courts, which is connected to judicial independence.

The emerging trend in modern military justice appears to be in favour of the discontinuation of automatic reviews of courts-martial decisions by reviewing authorities, and entrusting review powers to appeal courts. For example, New Zealand has abolished the Board of Review. Consequently, the Court Martial Appeal Court has been granted greater powers.¹⁷⁵ This,

¹⁷³ *Findlay v The United Kingdom* (1997) ECHR 8, para 77.

¹⁷⁴ I should point out, however, that M Carnelley 'The South African Military Court System – Independent, Impartial and Constitutional?' (2005) 33(2) *Scietia Militaria: South African Journal of Military Studies* 55 71 argues that problems relating to impartiality of military judges are adequately catered for in the military legislation. She relies on Rule 35 of the Military Discipline Act Rules of Procedure which makes provision for the recusal of a military judge in certain instances. However, this provision addresses concerns related to a specific judge sitting on a specific case. For example, if the judge is related to the complainant by affinity or consanguinity in the first or second degree. Rule 35 of the Military Discipline Act Rules of Procedure does not deal with impartiality or institutional independence concerns related to judges serving on the system in general. In her analysis, Carnelley fails to draw a distinction between specific concerns of impartiality which should be assessed on particular facts and general concerns of impartiality which should be assessed by looking at the entire system.

¹⁷⁵ See the Court Martial Appeals Amendment Act 2007.

combined with an expanded power to make special references to that Court through the Judge Advocate General in some way replaces the role of the Board of Review.¹⁷⁶

Furthermore, the recent reforms in Australia excluded the system of automatic review of proceedings by non-judicial authorities.

The automatic review of cases should be retained but carried out through a suitable judicial body. The Ministerial Task Team recommends that the military judicial review authority should be divested of powers to change decisions of military courts, and should only be empowered to make recommendations to the CMA. This suggestion could possibly work if the CMA sits on a full-time basis with the necessary capacity to consider all the recommendations that may come from the review authority.¹⁷⁷ The most viable option could be to create a standing court of military judicial reviews which focuses squarely on the reviews or to mandate the CMA with the task of reviews in addition to appeal powers. If the option of creating a new court is preferred, the conditions of service of the judges of the court could be along the lines already suggested with respect to the CMJ and the CSMJ. This will strengthen the dignity and credibility of military courts, and will also achieve the sought objective in respect of military judicial reviews.

7.5 Strengthening the Court of Military Appeals (CMA)

The main problems of the CMA as discussed are that the Act does not make provision for the appointment of its judges to be fixed when serving on the Court; and its military members are not secured. An additional problem is the existing practice of appointing members of the CSMJ to sit as military

¹⁷⁶ Section 24(1) of the Court Martial Appeals Amendment Act 2007 provides that '[t]he Judge Advocate General may refer to the Court a finding made, a conviction entered, or a sentence passed in any proceedings in the Court Martial if the Judge Advocate General thinks that it is in the interests of justice or discipline to do so.'

¹⁷⁷ The Court of Military Appeals usually sits for two sessions in a given year.

judicial members of the CMA.¹⁷⁸ It is anomalous for judges to act as both members of lower and higher courts. A stronger CMA with sufficient guarantees of independence is required in order for it to be a credible court to remedy the flaws in the lower levels. This is particularly important in the light of the recent ruling by the High Courts that there is no appeal from the CMA to the High Court.¹⁷⁹

The problems of the CMA stem from the fact that its actual status is unclear, and that it is not a full-time court. This is despite the fact that it handles a large number of cases. The Court finalised 154 cases for the period 01 April 2003 to 31 March 2004.¹⁸⁰ However, of the countries studied, only the United States has a full-time appellate military court with dedicated judges. The United States Court of Appeals for the Armed Forces is composed of five civilian judges appointed to serve for a 15 year non-renewable term. In fact, in most of the countries studied, judges of courts of military appeals serve for a fixed term, and are civilians. As for status, in Canada, New Zealand, the United Kingdom, and the United States, the Court Martial-Appeal Court is a superior court of record.¹⁸¹

In South Africa, a full-time CMA is certainly justified; it must be a superior court of record, and must be accorded a status similar to that of the High Court. It could be modelled on that of the United States given that the equivalent court in that country is full-time, and also handles a sizable number of cases.¹⁸² Having a full-time court may also improve its jurisprudence.

¹⁷⁸ See *Information Bulletin, Defence Legal Services Division* Vol. 4 Issue 6 (2008), 1 for names of some of the members of the CSMJ serving on the Court <http://www.dlsdiv.mil.za/infobulletins/Info%20Bulletin%20November%202008.pdf> [accessed on 13 July 2012].

¹⁷⁹ *Mbambo v Minister of Defence* (note 22) and *Borman v Minister of Defence* (note 23 above).

¹⁸⁰ Presentation of the Military Legal Services Division www.pmg.org.za/docs/2004/appendices/040907services.ppt [accessed on 06 June 2010]. The author has not been able to secure the latest statistics for the CMA.

¹⁸¹ Similarly, the Court-Martial Appeal Court of the neighbouring Zimbabwe is a superior court of record. See s 79(3) of the Defence Act of Zimbabwe which makes reference to the Court Martial Appeal Court as 'a superior court of record.'

¹⁸² In 2009, the Court handled 213 petitions and other categories of cases. See Annual Report of the United States Court of Appeals for the Armed Forces

However, South Africa should keep the mixed composition of the court – civilian and military – to ensure that the balance of perspective brought by this arrangement is kept. It is suggested that the composition should be three civilian judges, two of whom must have served as high court judges for purposes of experience on the court and one military judge to bring military law experience but this member must not be a member of any of the lower military courts for obvious reasons. Last but not least, a lay member with operational or command experience should be appointed for a five year non-renewable term, and this could be a retired person. The civilian judges and the military judge should be appointed for a fixed non-renewable term of 15 years. The members should be appointed by the Minister of Defence on the recommendation of the Military Judicial Commission proposed and discussed in this chapter. These proposals would ensure that the Court is balanced, experienced, diverse, and most importantly, independent.¹⁸³

7.6 Concluding remarks

It is hoped that the model of judicial independence suggested in this chapter will go a long way in addressing problems of judicial independence of military courts identified in this thesis.

The next chapter summarises the findings and recommendations of the thesis in its entirety.

www.armfor.uscourts.gov/annual/FY09AnnualReport.pdf for full statistical data of the Court [accessed on 06 June 2010].

¹⁸³ See Rowe (note 168 above) 87, commenting generally on the composition of military appeal courts and alluding to various models.

CHAPTER 8

CONCLUSION

This study has examined the judicial independence of South African military courts. It has centred around two major and related questions. The first was whether South African military courts are independent, and the second was ways in which their independence could be improved. Its aim was to demonstrate that South African military courts do not meet the basic requirements of judicial independence, and more important, to suggest feasible ways of fixing the problems identified.

Before answering the two major questions, the study looked at certain aspects which needed to be understood before reaching the main issues. It started off by describing the military court system from an historical perspective up to the current system, analysing the status of military courts and assessing their uniqueness. An attempt was also made to locate the status of the CODH within the military court system. It then provided an analysis of the relevant theoretical framework, its application to military courts and an assessment of the judicial independence of South African military courts. Finally, it suggested ways of improving their judicial independence.

In line with the major questions investigated, two arguments permeate the thesis: that military courts do not meet the basic requirements of judicial independence; and that the new model of judicial independence for South African military courts must take into account the following factors: relevant principles of constitutional and international law relating to judicial independence and the right to a fair trial; emerging foreign trends and most importantly, military needs or operational effectiveness. It is hoped that the value and the need of these factors were demonstrated in the thesis.

The main findings and recommendations of the study as set out in various chapters are as follows. These include findings on the preliminary questions and main questions of the study.

8.1 Main findings and recommendations

The findings that follow include findings on the preliminary questions and main questions of the study.

8.1.1 Findings on the preliminary questions of the thesis

The findings on the preliminary questions of the study are as follows.

(a) Military courts are part of the South African judicial system

The place of military courts within the South African judicial system has always been unclear. This study looked at that question by analysing several provisions of the Constitution and the relevant legislation. It found that military courts are actually part of the South African judicial system despite their separate existence. That means two things: that the principles of judicial independence apply to those courts; and it also means that the separate existence of military courts has no bearing on whether standards of judicial independence apply to those courts. The question therefore is rather how those standards could be applied to military courts given their uniqueness

(b) The uniqueness of military courts is changing

Military courts are still unique in many senses despite the radical changes they have gone through since the dawn of democracy in South Africa. For example, they are still unique in their purpose, their jurisdiction

in respect to the offences they deal with, their uniformed personnel, and their extra-territorial jurisdiction. However, this study established that their uniqueness is not static—it can rather be described as changing given the events in the last decade or so, both in South Africa and in countries considered in this thesis. There was a time when these courts were completely subsumed within the military command. That was seen as part of their uniqueness; but that thinking has lost ground due to a number of factors. In South Africa, the main driving force for the changes has been the new Constitution. Today, these courts are more or less akin to civilian courts in many respects. Although the structure of their judicial independence is still unique and unusual, more changes to that aspect can be expected in the near future as it has been happening in other parts of the world.

(c) *The Commanding Officer's Disciplinary Hearing is not a court of law*

The Military Discipline Act classifies the CODH as a military court. Identifying the actual status of the CODH is not without difficulty. This study has established that although the CODH is more like a court of law, it is not a court of law because it does not have some of the key attributes of what constitutes a court. Its character and stature are in line with similar forums in selected open and democratic societies, some of which have recently reformed their military justice systems. At best it could be identified as a unique disciplinary tribunal. The conclusion reached means that the CODH cannot be expected to comply with the requirements of judicial independence as provided for in s 165 of the Constitution since those only apply to courts of law or tribunals envisaged in s 34 of the Constitution. Although there is room for improvement, it has also been established that the CODH is generally constitutionally defensible.

(d) *Judicial independence does not bear a different meaning for military courts*

This study assessed some key authorities on the meaning of judicial independence. It found no evidence suggesting that judicial independence bears a different meaning for military courts or that the concept is subject to limitation. Most importantly, the Constitutional Court of South Africa has stated that judicial independence is not subject to limitation. This means the fact that military courts are unique would not necessarily result in a limited application of principles of judicial independence to those courts. It only means that applying principles of judicial independence to military courts would, in some cases, be challenging, and that, in certain areas, unique measures may need to be adopted to satisfy the requirements of judicial independence. Most precedents which shield military courts from full application of judicial independence unpersuasively rely on the historical uniqueness of military courts, and in some cases on ambiguous instruments or constitutional provisions relating to the application of principles of judicial independence to military courts. None of those authorities suggest a different or parallel meaning of judicial independence for military courts.

(e) *The interpretive problems of international instruments regarding the application of standards of judicial independence and fair trial do not affect South African military courts*

The limited regulation of military courts in universal human rights instruments has over the years made it possible for those courts to operate in ignorance of principles of judicial independence and some fair trial standards. It is on that basis that there are moves at the UN to ensure specific and universal regulation of military courts.

Nonetheless, this study has found that the interpretative problems in universal human rights instruments do not affect South African military courts because they are empowered to try both military and criminal offences. The interpretative problems referred to above only affect military courts with no jurisdiction to try criminal offences over and above military offences. The study has also observed that those interpretative problems have lost prominence because the relevant treaty and judicial bodies have found ways of filling the gaps. Moreover, the Geneva Convention (III) Relative to the Treatment of Prisoners of War expects military courts to be independent. More importantly, the African Charter is the best authority for showing that military courts are subject to principles of judicial independence due to its unequivocal language that the States parties '[s]hall have the duty guarantee the independence of the Courts.' That language has been boosted by the interpretation of the African Commission that '...military courts are required to respect fair trial standards'¹ which includes the right to be tried by an independent and impartial tribunal.

8.1.2 Main findings on the primary questions of the study

Having disposed of the preliminary questions of the study, the main findings of the thesis are as follows.

(a) A military judicial office is not institutionalised

This study has established that a military judicial office is not institutionalised because military judges in lower courts are not appointed to a judicial office as required. They are rather assigned to act or serve as judicial officers. This means that a military judicial office is not guaranteed because a judicial function is seen as more of an assignment than an office

¹ African Commission on Human and Peoples' Rights, Dakar Declaration and Recommendations Twenty-sixth Session (1999), para 3 in Christof Heyns (ed.) *Human Rights in Africa*: Vol. 1 586.

which is held by the relevant officers. It was noted that this raises questions about the status of military judges as judicial officers.

There is a need to fully institutionalise a military judicial office. This must be done by ensuring that military judges are *appointed* to a military judicial office instead of being assigned to act or serve as such. It would help enhance the status and independence of military courts because military judges would be guaranteed a judicial office. It has been established that a majority of the countries surveyed in this study have fully institutionalised a military judicial office.

(b) *Military courts fail to meet most requirements of judicial independence—from the top to the bottom*

Building on the previous research of the author, this study found that military courts do not meet most aspects of judicial independence. That conclusion applies to all military courts right from the CMA to the CMJ.

The thesis established that although military judges enjoy some degree of security of tenure, the lack of legislative clarity on the renewal of military judicial assignments does not help their independence. Assignment of judges to serve a two year term may frequently make military judges to be too concerned about the renewal of their assignments in the process of adjudicating cases. Moreover, a recent case of the Constitutional Court in *Justice Alliance v The President of the Republic of South Africa* suggests that renewable terms of appointment are constitutionally questionable.

While the grounds for removal of judges comply with the requirements of judicial independence, the lack of procedure for their removal and the involvement of only the AG and the Minister of Defence in removing military judges are inconsistent with the requirements of judicial independence. Furthermore, the study found that the current system of remuneration of military law officers is not suitable for military judges. The financial security of these judges is inadequate. Another area of concern is that military courts

do not enjoy institutional independence on important administrative aspects such as assignment of judges and control over administrative staff assisting in the running of the courts.

What is even more concerning is that the independence of the Court (CMA) that is supposed to remedy the flaws from lower military courts is questionable because the law does not guarantee the tenure of its members and it has also been established that its composition is questionable. Based on all those flaws, it has been concluded that a reasonable and informed person would not perceive military courts to be independent and impartial. Finally, the study has also concluded that the current system of automatic military judicial reviews by officers who are not part of the military judiciary compromises the dignity and credibility of military courts.

(c) *Military courts are almost on a par with magistrates' courts*

The study compared the CMJ with ordinary magistrates' courts and the CSMJ with regional magistrates' courts. These courts were compared with regard to their jurisdiction and sentencing powers. The result of the comparison is that the CMJ compares very closely with ordinary magistrates' courts, and that the CSMJ is almost on a par with regional magistrates' courts. The overall picture presented was that military courts compare very closely with magistrates' courts. The study also found that the CMA can be regarded as a court with status similar to that of the High Court given its appellate powers within the military court system as recently interpreted by the High Court. It has been suggested that these findings should be taken into account in structuring the judicial independence of future military courts.

(d) The independence of military courts should be improved by integrating principles of judicial independence into the existing military set up

This study found that there are basically two approaches that could be followed in improving the independence of military courts. The first of these is that military courts could be integrated into civilian courts thereby benefiting from strong measures of judicial independence found in civilian courts. The second entails integrating principles of judicial independence into the existing set up of military courts – this means keeping military courts within the military establishment. After analysing both approaches, the latter was recommended as the suitable approach to addressing existing challenges of judicial independence of military courts in South Africa.

(e) There is strong movement towards strengthening the judicial independence of military courts in the majority of countries studied

In this study, developments in the United States, the United Kingdom, Australia, Canada, New Zealand and India were considered. Although Uganda was referred to in setting the tone for the thesis, it was not considered for comparative study for reasons set out in Chapter One. The survey conducted shows that in all countries but the United States, strong measures have been taken to guarantee the judicial independence of military courts. Even though there have not recently been reforms of independence of military courts in the United States, several calls have been made for such. The movement described above is boosted by efforts at the level of the UN to regulate universally military courts.

Countries which have reformed their military courts have been influenced by different factors at different times. In Canada and the United Kingdom, the reforms have largely been forced upon the military due to successful court challenges on the independence of respective military court systems. On the other hand, the reforms in Australia and New Zealand have

to large degree been voluntary since there have not been direct judicial challenges to reform the independence of military courts, with the exception to the challenge in *Lane v Morrison* with reference to Australia. Having said that, it is important to note that, developments in Canada, the United Kingdom, and to some extent South Africa, have influenced the need for reforms in New Zealand and Australia. At the center of all the reforms is the need ensure that military personnel receive a fair trial and to also boost the credibility of military justice systems.

8.1.3 Summary of key proposals for the improvement of judicial independence of South African military courts

In Chapter Seven, the study made the following key proposals for the improvement of judicial independence of South Africa military courts.

(a) A structure to deal with the military judiciary

This study has observed that appointment and renewal processes, removal processes, determination of salaries and conditions of military judges have an impact on the independence of judicial officers. It has established that the current processes in relation to South African military judges on those aspects do not enhance judicial independence. It therefore recommends the establishment of an Independent Military Judicial Commission or a similar body that would oversee the appointment and renewal processes of military judges, removal processes, and determination of their salaries and conditions of service. The details on the structuring and composition of such a proposed body have been discussed in Chapter Seven.

(b) *Tenure of South African military judges should be fixed until the age of retirement*

We have noted in Chapter Six that military judicial assignments are usually fixed for two years as matter of practice rather than law. Having studied the pros and cons of various options on the tenure of military judges existing in the countries studied, this study recommends fixing the appointment of military judges until the age of retirement which could be set at 60 years for reasons set out in Chapter Six. This proposal is in line with an emerging trend among some of the progressive countries in this field. The appointment should be subject to a probationary period of three years. To help reduce the potential of judges wanting to please the command or the executive for purposes of securing promotion, military judges should not be entitled to promotion or subject to any non-judicial transfer. However, it important to re-iterate that there is a policy choice to be made in this area. Short to medium term fixed appointments are constitutionally acceptable provided that they are not renewable; but there is a clear trend in favour of granting tenure until the age of retirement.

(c) *Remuneration of military judges should be guided by factors which would ensure their financial security*

This study has proposed that the remuneration of military judges should be guided by the following factors: the role, status, duties, functions and responsibilities of military judges including their unique circumstances; the status of military courts within the South African judicial system; the role of financial security of military judges in ensuring judicial independence; the available resources of the state taking into account the prevailing economic conditions; inflation, and the need to attract outstanding officers as military judges.

(d) *Salaries of military judges should be structured along the lines of those of magistrates*

Because this study finds that military courts compare very closely with magistrates' courts, it recommends that the salaries of military judges be drawn very closely to those of magistrates. It has been suggested that the cost for the proposed change would be negligible given the relatively small size of the military judiciary as discussed in Chapter Seven.

(e) *The procedure for removal of military judges should be spelled out in the relevant legislation*

It has been established that the current framework for the removal of military judges is sketchy and inadequate. Given that security of tenure is the heart of judicial independence, it is imperative that the procedure for removal of military judges be reasonably spelled out in the relevant legislation. That procedure must involve appropriate functionaries as set out in Chapter Six.

(f) *The powers of the Adjutant General concerning the administration of military courts should be reduced*

In Chapter Six, it was noted that the sweeping powers of the AG on the administration of military courts negatively affect their institutional independence. That problem can be fixed by scaling down the powers of the Adjutant General on the administration of military courts, particularly in relation to the assignment of judges, the direction of administrative staff concerning military courts and the overall command and control role of the AG. Those powers should primarily rest with the Chief Military Judge. The study has established that there is a strong trend among countries studied in support of the proposed arrangement. Moreover, it has also been demonstrated that the general South African court context supports the proposed arrangement as a matter of principle.

(g) *The military character of military courts should be retained*

We have noted that there is an emerging trend among some countries to civilianise military courts with the view of addressing challenges of institutional independence and impartiality of military judges. In this study, that approach has not been supported because military courts are part of military capacity in South Africa. Furthermore, there are other challenges associated with the civilianisation of military courts discussed in Chapter Six. It is therefore recommended that the military character of military courts be kept but making significant reforms to the existing framework in order to guarantee their judicial independence. At the same time, it is acknowledged that there is scope for further debate about partial civilianisation of the military court system to the extent that this is not to the detriment of the effectiveness of the system.

(h) *A standing court of military judicial reviews should be created*

The study has argued that the current system of military judicial reviews compromises the dignity and credibility of military courts because it involves changing decisions of military courts by a non-court entity. The system of reviews should continue but must be conducted by an appropriate body. In that connection, it is recommended that a court of military judicial reviews must be established to take over the responsibility of the existing military judicial review authority.

(i) *The Court of Military Appeals should be restructured*

It has been noted have that the CMA sits at the apex of the military court system. Furthermore, it has also been established that although that Court is more independent than lower military courts, it is not free from concerns relating to judicial independence. Its members have no security of

tenure, and its status is unclear. This study recommends making that Court full-time, and its judges should be appointed for a fixed non-renewable term of at least 15 years. The court could generally be modeled on the United States Court of Appeals for the Armed Forces. Its composition must be diverse; and it must be a superior court of record.

8.2 Final remarks about the thesis

The measures suggested in this study would ensure that South African military courts have an acceptable degree of judicial independence. Some of the measures suggested are mandatory while others can best be described as merely desirable. The suggestions made would not necessarily make military courts absolutely independent from the chain of command and the executive since that can hardly be achieved in the context of military courts. Similarly, absolute independence cannot be achieved in the context of civilian courts given the elusive nature of separation of powers and judicial independence. The goal therefore should always be one of achieving an acceptable degree of independence of military courts by ensuring that these courts meet the basic requirements of judicial independence.

The South African military should be pro-active in improving the independence of military courts. Failure to do so may lead to changes being forced upon the military following litigation or political pressure. The changes adopted in 1999 were forced upon the military as a result of successful litigation in the *Freedom of Expression* case. Recently, there has been a great deal of political pressure on the military to improve the judicial independence of military courts. A pro-active approach would be in the interest of the military and everyone involved. In the process of reforming the system, it is important to realize that the 'right' of the military to be

different has been eroded significantly in the past two decades; we have now entered the era of the need to be different.²

8.3 Areas for future research

Although this study was comprehensive in looking at the judicial independence of military courts, there are two aspects which must be investigated separately. The first is the link between a fair and independent military court system and high levels of military discipline. This study has made a positive assumption about this question but there is scope for research.

Lastly, more work could be done on the implications of civilianisation of the military court system in the modern age, and perhaps attention to the prosecutorial and defence roles in military courts. Rowe is on point when he observes that the presence of independently-minded and impartial lawyers as actors in the process of military courts is an important ingredient to a fair trial.³ This means that securing the independence of military judges constitutes only one piece of the puzzle.

² See generally Gerry R. Rubin 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' 2002 62, 39 *Modern Law Review* 36 on the two concepts.

³ Peter Rowe (ed.) *The Impact of Human Rights Law on the Armed Forces* (2006) 85.

BIBLIOGRAPHY

BOOKS AND MONOGRAPHS

- Afredsson, Gundmundur & Eide, Asbjørn (eds.) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999), Martinus Nijhoff Publishers, The Netherlands
- Basson, Dion A. & Viljoen, Henning P. (ed.) *South African Constitutional Law* (1988), Juta & Co. Ltd, Cape Town, South Africa
- Clark, David (eds.) *Principles of Australian Public Law* (2007), LexisNexis Butterworths, Australia
- Currie, Ian & de Waal, Johan (eds.) *The Bill of Rights Handbook* (2005), Juta & Co. Ltd. Cape Town, South Africa
- Democratic Rights and Governance Unit (ed.) *The Judicial Institution in Southern Africa* (2006), **SiberInk**, Cape Town, South Africa
- Heyns, Christof (ed.) *Human Rights in Africa: Vol. 1* (2004), Martinus Nijhoff Publishers, The Netherlands
- International Commission of Jurists *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors A Practitioners' Guide* (2004), <http://www.icj.org/IMG/pdf/Guide.pdf>
- Jha, Umesh (ed.) *The Military Justice System in India: An Analysis* (2009), LexisNexis Butterworths Wadhwa, India
- Jha, U.C. (ed.) *The South Asian Military Law Systems* (2010), KW Publishers Pvt Ltd, India
- Nolte, Georg (ed.) *European Military Law Systems* (2003), De Gruyter Recht, Berlin
- Nowak, Manfred (ed.) *UN Covenant on Civil and Political Rights CCPR Commentary* (1993), Kehl am Rhein: N.P. Engel, Germany

Rowe, Peter (ed.) *The Impact of Human Rights Law on the Armed Forces* (2006), Cambridge University Press, Cambridge

Russell, Peter H. and O'Brien, David M. (eds.) *Judicial Independence in the Age of Democracy, Critical Perspectives from Around the World* (2001), The University Press of Virginia, United States

Shetreet, S. & Deschenes, J. (ed.) *Judicial Independence: The Contemporary Debate* (1985), Martinus Nijhoff Publishers, The Netherlands

Shackelton, Robert *Montesquieu: A Critical Biography* (1961), Oxford University Press

Stephanos Stavros (ed.) *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (1993), Martinus Nijhoff Publishers, The Netherlands

Stoop, B.C. *The Law of South Africa* (2005), Butterworths, Durban, South Africa

CHAPTERS IN BOOKS

Corder, Hugh 'Appointment, Discipline and Removal of Judges in South Africa' in H.P. Lee (ed.) *Judiciaries in Comparative Perspective* (2011)

Lederer, Fredric I. & Zelif, Barbara Hundley 'Needed: An Independent Military Judiciary. A Proposal to Amend the Uniform Code of Military Justice' 25, in Eugene R. Fidell & Dwight H. Sullivan (ed.) *Evolving Military Justice* (2002)

Lehtimaja, L. & Pellonpaa, M. 'Article 10', in Gundmundur Afredsson & Asbjørn Eide (eds.) *The Universal Declaration of Human Rights: A Common Standard of Achievement* 228

Nolte, Georg & Kriege, Heike 'Comparison of European Military Law Systems' 137 in Georg Nolte (ed.) *European Military Law Systems* (2003)

Russel, Peter H. 'Toward a General Theory of Judicial Independence' in Peter H. Russel & David M. O'Brien (ed.) *Judicial Independence in the Age of Democracy* (2001) The University Press of Virginia, United States

ARTICLES

Botha, C. J. 'Jungle justice and the fundamental rights – military courts in a future constitutional dispensation' (1994) 17 *African Defence Review* 1

Calabresi, Steven G. and Lindgren, James 'Term Limits for the Supreme Court: Life Tenure Reconsidered' (2006) Vol. 29 *Harvard Journal of Law and Public Policy* 770

Carnelley, M 'The South African Military Court System – Independent, Impartial and Constitutional?' (2006) 34(1) *Scientia Militaria: South African Journal of Military Studies* 55

Cochrane, Kathryn 'Lane v Morrison' (2009) 61 *AIAL Forum* 62

Doi, Michael 'The Judicial Independence of Canadian Forces General Court Martials: An Analysis of the Supreme Court of Canada Judgment in *Regina v. Genereux*' (1993) 16 *Dalhousie Law Journal* 234

Franco, J. and Powell, C. 'The Meaning of Institutional Independence in *Van Rooyen v The State*' (2004) 121(4) *South African Law Journal* 562

Gibson, Michael R. 'International Human Rights Law and Administration of justice through Military Tribunals: Preserving Utility while Precluding Impunity' (2008) *Journal of International Law and International Relations* Vol. 4(1) 1

Gilbert, Michael 'Summary Courts-Martial: Rediscovering the spumoni of military justice' (1996) 39 *A.F.L. Rev.* 119

Gournoyer, Guy and Dickson, Tiphaine 'Of Legal Free Trade and Opportunity Lost: How Canadian Constitutional Law could have Tipped

- the Scale in Favour of an Independent Military Justice System in the United States' (May 1994) 41 *Federal Bar News & Journal* 270
- Griggs, Chris 'A New Military Justice System in New Zealand' (2006) 6 *New Zealand Armed Forces Law Review* 62
- Groves, Matthew 'The Civilianisation of Australian Military Law' (2005) 28(2) *University of New South Wales Law Journal* 364
- Huestis, Bradley 'The Art of Trial Advocacy: Summary Court-Martial: Using the Right Tool for the Job' (2002) July *Army Lawyer* 52
- Jason, J. Samson and Maden, Mike 'Entrench the Bench! Canada's Pressing Need for a Permanent Military Court' (2009) *Criminal Law Quarterly* 215
- Jones, Rachel 'Recent Reforms to the Australian Defence Force Discipline System' (2007) Vol. 7 *New Zealand Armed Forces Law Review* 77
- Malleon, Kate 'Judicial Training and Performance Appraisal: The Problem of Judicial Independence' (1997) Vol. 60 *Modern Law Review* 657
- Malleon, Kate 'Assessing the strengths and weaknesses of a Judicial Appointment Commission' May (1998) *Amicus Curiae* 16
- Malleon, Kate 'Assessing the performance of the Judicial Service Commission' (1999) Vol. 116(1) *South African Law Journal* 36
- McNairn, David 'Does Canada Need a Permanent Military Court?' (2006) 18 *National Journal of Constitutional Law* 2005
- McNairn, D 'Military Law Reform in Canada' (2003) *New Zealand Armed Forces Law Review* 51
- Okpaluba, C 'Institutional independence and the constitutionality of legislation establishing lower courts and tribunals: Part I' (2003) 28(2) *Journal for Juridical Science* 109
- Phillip, H. 'Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously' (2002) 33 *Columbia Law Review* 2

Rowe, Peter 'A New Court to Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court' *J. Conflict & Sec. L.* (2003), Vol. 8 No. 1 201

Rubin, G.R. 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' (2002) 62 *Modern Law Review* 36

Tshivhase, Aifheli Enos 'Military Courts in a democratic South Africa: An assessment of their independence' (2006) 6 *New Zealand Armed Forces Law Review* 96

Tshivhase, Aifheli Enos 'Transformation of Military Courts' (2009) 24(2) *SA Public Law* 450

THESES

Anderson, G. C. *The legal classification of military courts as courts of law* (1988) Unpublished LL M Dissertation, University of Pretoria

Nel, Michelle *Sentencing Practice in Military Courts* (2012) Thesis submitted for LL D Degree, University of South Africa

http://uir.unisa.ac.za/bitstream/handle/10500/5969/dissertation_nel_m.pdf?sequence=1

CONFERENCE PAPER

Dahl, Willy 'International Trends in Military Justice' 2011, paper presented at the Global Military Appellate Seminar at Yale Law School, U.S.A.

http://www.law.yale.edu/2011-04_International_trends.pdf

REPORTS AND POLICY DOCUMENTS

Annual Report of the Department of Defence (South Africa) 2007/08

Department of Defence, Australian Government Response to the Senate Foreign Affairs, Defence and Trade Resolutions Committee *Report on*

The Effectiveness of Australia's Military Justice System (2005)
www.defence.gov.au/mjs/docs/MJ_GOVERNMENT_RESPONSE_4oct052.pdf
 [accessed on 20 June 2006]

Annual Report of the United States Court of Appeals for the Armed Forces
 (2009) www.armfor.uscourts.gov/annual/FY09AnnualReport.pdf
 [accessed on 06 June 2010].

Department of National Defence (Canada) *Report on the Compensation of Military Judges* (2004)
www.forces.gc.ca/site/reports/mjcc04/index_e.asp [accessed on 30 March 2006]

Department of National Defence (Canada) *Report on the Compensation of Military Judges* (2008) www.forces.gc.ca/site/reports-rapports/mjcc08/index-eng.asp [accessed on 15 April 2010]

International Commission of Jurists *Military Jurisdiction and International Law: Military Courts and Gross Violations of Human Rights* (2004)

Occupation Specific Dispensation for Military Law Practitioners (South Africa), 2009

The Ministerial Task Team Report (South Africa), 2004

Report on Civil and Political Rights including the Question of Independence of the Judiciary, Administration of Justice, Impunity, Issue of the Administration of Justice through Military Courts UN Doc. E/CN.4/2006/58 (13 January 2006)

The Military Justice Act of 1983, Advisory Commission Report Vol. I (United States) http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf
 [accessed on 18 April 2010]

UN Sub-Commission on the Promotion and Protection of Human Rights, *Administration of Justice: Issue of the administration of justice through military tribunals*, UN Doc E/CN.4/Sub.2/2002/4

SOUTH AFRICAN CASES

Borman v Minister of Defence 2007 (2) SA 388 (C)

Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC)

Council of Review, South African Defence Force, and Others v Mönnig and Others 1992 (3) SA 482 (A)

Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC)

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC)

Ex Parte Chairperson of the National Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (second certification case) 1997 (2) SA 97 (CC)

Freedom of Expression Institute and Others v President, Court Martial and Others 1999 (2) SA 471 (C)

Gcaba v Minister of Safety and Security and Others 2010 (1) SA 238 (CC)

National Director of Public Prosecutions v Philips and Others 2002 (4) SA 60 (W)

Nel v Le Roux and Others 1996 (3) SA 562 (CC)

President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others 1999 (4) SA 682 (CC)

Justice Alliance of South Africa v President of the Republic of South Africa and Others 2011 (5) SA 388 (CC)

Mbambo v Minister of Defence 2005 (2) SA 226 (T)

Minister of Defence v Potsane & Others 2002 (1) SA 1 CC

Minister of the Interior and Another v Harris and Others 1952 (4) All SA 376 (A)

S v Basson 2007 (3) SA 582 (CC)

S v Makwanyane and Another 1995 (3) SA 391 (CC)

S v Pennington 1997 SA 1076 (CC)

Sidumo and Another v Rustenburg Platinum Mine Ltd and Others (2) SA 24 (CC)

South African National Defence Union v Minister of Defence and Another 1999 (6) BCLR 615 (CC)

South African Technical Officials' Association v President of the Industrial Court and Others 1985 (1) SA 597 (A)

SANDU v Minister of Defence and Others 2007 (8) BCLR 863 (CC)

South African Rugby Football Union and Others v President of the Republic of South Africa 1999 (4) SA 147 (CC)

The State v Basson (2005) (1) SA 171 (CC)

Van Rooyen v The State (2002) (5) SA 246 (CC)

FOREIGN CASES

Australia

Lane v Morrison (2009) 239 CLR 230

Shell Company of Australia Ltd v Federal Commissioner of Taxation 1931 AC 275 (PC)

Canada

Canada v Beauregard (1986) 30 DLR (4th) 481

R. v. Dunphy and R. v. Parsons [2007] CMAC 1

R. v. Généreux (1992) 1 S.C.R. 259

R. v. Lauzon 1998 CMAC 5

R. v. Leblanc 2011 CMAC 2

Reference re: Public Sector Pay Reduction Act (PEI), Attorney General of Canada et al, Interveners; Reference re: Independence of Judges of Provincial Court, Prince Edward Island, Provincial Court Act and Public Sector Pay Reduction Act; Attorney General of Canada et al, Interveners (1997) 150 DLR (4th) 577

Lesotho

Sekoati and Others v President of the Court Martial and Others 2000 (12) BCLR 1373 (LesCm)

Sekoati and Others v President of the Court Martial and Others 2001 (7) BCLR 750 (Les)

Uganda

Uganda Law Society v Attorney General of the Republic of Uganda (2006) UGCC 10

United Kingdom

R v Boyd (2002) UKHL 31

United States of America

Oppermann v. United States 2007 Civil Action No. 06-1824 (EGS)

Weiss v United States 510 U.S 163 (1994)

United States v Graf 35 M.J. 450 (1992)

INTERNATIONAL CASES

Bell v the United Kingdom [2007] ECHR 47

Castillo Petruzzi et al (1999) Inter-American Court of Human Rights
http://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf

Cooper v The United Kingdom [2003] ECHR 686

Engel and Others v The Netherlands [1976] 1 EHRR 647

Findlay v The United Kingdom [1997] ECHR 8

Grievies v The United Kingdom [2004] 39 EHRR 2

Incal v Turkey [1998] ECHR 48

Mehmet Ali Yilmaz v Turkey [2001] ECHR 548

INTERNATIONAL COMMUNICATIONS, OBSERVATIONS AND GENERAL COMMENTS

African Commission on Human and Peoples' Rights (2001) Communication
 218/98 (Nigeria)

UN Human Rights Committee, General Comment No 13 (Equality before the
 courts and the right to a fair and public hearing by an independent
 court established by law) Twenty-first session (1984)

UN Human Rights Committee, Concluding Observations: Columbia, UN Doc
 CCPR/C/79/Add.76 (1997)

UN Human Rights Committee, Communication No. 263/1987, *M. Gonzalez
 del Rio v Peru*, UN Doc CCPR/C/46/D/263/1987 (1992)

SOUTH AFRICAN STATUTES AND REGULATIONS

Criminal Procedure Act 51 of 1977

Defence Act 44 of 1957

Defence Act 42 of 2002

Defence Act (Amendment) and the Dominion Forces Act 32 of 1932

Defence Amendment Act 22 of 2010

Constitution of the Republic of South Africa, 1996

General Regulations (GNR. 361 of 11 March 1994) enacted in terms of s 10
the Magistrates Act 90 of 1993

Independent Commission for the Remuneration of Public Office-bearers Act
92 of 1997

Interim Constitution Act 200 of 1993

Judges' Remuneration and Conditions of Employment Act 47 of 2001

Labour Relations Act 66 of 1995

Military Discipline Supplementary Measures Act 16 of 1999

Military Discipline Supplementary Measures Act: Rules of Procedure made
by the Minister of Defence under s 44(4) of the Act: GNR.747 of 11
June 1999

Magistrates' Act 90 of 1993

Proclamation No. 44, 2010

Proclamation No. 54, 2011 made in terms of the Magistrates' Act 90 of 1993

Public Service Act, 1994 (Proclamation No. 103 of 1994)

South Africa Defence Act 13 of 1912

FOREIGN STATUTES***Australia***

Defence Legislation Amendment Act 2006 (repealed)

Military Justice (Interim Measures) Act (No.1) 2009

Military Justice (Interim Measures) Act (No. 2) 2009

Canada

National Defence Act (as amended) R.S.C., 1985, c. N-5

Queens Regulations and Orders for the Canadian Forces 2006

Ghana

Armed Forces Act 105 of 1962

India

Air Force Act 45 of 1950

Army Act 46 of 1950

Navy Act 62 of 1957

The Armed Forces Tribunal Act 55 of 2007

New Zealand

Court Martial Act 101 of 2007

Remuneration Authority Act 110 of 1977

Armed Forces Discipline Amendment Act (No 2) 2007

Tanzania

Military Court Act 15 of 1964

Uganda

The Uganda Peoples Defence Forces Act 7 of 2005

United Kingdom

Army Act, 1881

Armed Forces Act 2006 (c.52)

Courts Martial (Appeals) Act 1951 (c.46)

United States of America

Rules for Courts-Martial

Uniform Code of Military Justice, 1950

Zimbabwe

Defence Act: Chapter 11:02, 1972

BILLS

Military Court of Australia Bill 2012

TREATIES

African Charter on Human and Peoples' Rights, 1981

American Convention on Human Rights, 1969

European Convention on Human Rights, 1950

Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949

International Convention on the Protection of the Rights of All Migrant
Workers and Members of Their Families, 1990

International Covenant on Civil and Political Rights, 1966

DECLARATION

Universal Declaration of Human Rights, 1948

INTERNATIONAL PRINCIPLES

Bangalore Principles of Judicial Conduct, 2002

Draft Principles Governing the Administration of Justice through Military
Tribunals, E/CN.4/2006/56

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance
in Africa DOC/OS(XXX)247

United Nations Basic Principles on the Independence of Judiciary General
Assembly res 40/32 and 40/146 of 13 December 1985

OTHER INFORMATION FROM THE INTERNET

Information Bulletin, Defence Legal Services Division Vol. 4 Issue 5 (2008)

<http://www.dlsdiv.mil.za/infobulletins/Info%20Bulletin%20October%202008.pdf> [accessed on 13 July 2012]

Information Bulletin, Defence Legal Services Division Vol. 4 Issue 6 (2008)

<http://www.dlsdiv.mil.za/infobulletins/Info%20Bulletin%20November%202008.pdf> [accessed on 13 July 2012]

Presentation of the Military Legal Services Division, Parliament of the
Republic of South Africa

www.pmg.org.za/docs/2004/appendices/040907services.ppt [accessed
on 06 June 2010]

Statistics South Africa *Mid-year Population Estimates* July 2009 available at

<http://www.statssa.gov.za/publications/P0302/P03022009.pdf>
[accessed on 24 May 2010]